US Army Corps of Engineers ®
St. Paul District

WISCONSIN DEPT. OF NATURAL RESOURCES

SPECIAL PUBLIC NOTICE

ISSUED: July 15, 2024
EXPIRES: August 14, 2024

ANNOUNCEMENT OF RELEASE OF THE WISCONSIN GUIDELINES VERSION 2

The U.S. Army Corps of Engineers St. Paul District Regulatory Division (Corps) and Wisconsin Department of Natural Resources (Wisconsin DNR) are announcing the release of the draft Wisconsin Guidelines, Version 2 (Wisconsin Guidelines). The agencies have developed the Wisconsin Guidelines as two documents, one tailored for sponsors titled *Procedures for Developing Wetland Compensatory Mitigation Sites in Wisconsin* and the second for applicants/permittees titled *Procedures for Project Proponents on Compensatory Mitigation Requirements in Wisconsin*. The agencies previously solicited feedback on the draft outlines for both procedures on May 24, 2023, and hosted a listening session on July 6, 2023.

Together, these documents provide an overview of the state and federal mitigation programs, regulations and requirements for applicants and exempt project proponents (collectively referred to as project proponents) who need to provide compensatory mitigation, and for mitigation bank sponsors, in-lieu fee site sponsors, and permittee-responsible mitigation project proponents (collectively referred to as sponsors) who are planning, constructing and monitoring wetland compensatory mitigation sites. These documents replace the 2013 Wisconsin Guidelines and clarify existing requirements related to wetland impacts regulated under Section 404 of the Clean Water Act and s. 281.36, Wis. Stats.

The Corps and Wisconsin DNR are soliciting public feedback on these documents during this special public notice period. We will also host a virtual listening session on July 23, 2024, to answer questions and collect feedback verbally. If you are on the Corps' email distribution list for mitigation-related announcements, you will receive an invitation from Leslie Day once we schedule the listening session. If you are not currently on the email distribution list, please contact Leslie Day at Leslie.E.Day@usace.army.mil to receive a calendar invite.

The Corps and Wisconsin DNR welcome any comments related to the content and use of the Wisconsin Guidelines and will consider all comments before finalizing these Wisconsin Guidelines for use in Wisconsin. You may email comments to Leslie.E.Day@usace.army.mil and Thomas.Pearce@wisconsin.gov@wisconsin.gov. In the absence of email, you may mail comments to: U.S. Army Corps of Engineers, St. Paul District Regulatory Division, c/o Leslie Day, 332 Minnesota Street, Suite E1500, St. Paul, Minnesota 55101.

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St. Paul District

WISCONSIN DEPT. OF NATURAL RESOURCES

Wisconsin Mitigation Guidelines Procedures for Project Proponents on Compensatory Mitigation Requirements Version 2

July 2024

Table of Contents

1. Background and Use of the Wisconsin Mitigation Guidelines

The U.S. Army Corps of Engineers St Paul District (Corps) and the State of Wisconsin Department of Natural Resources (DNR) updated these Wisconsin Mitigation Guidelines to provide an overview of the mitigation regulations and requirements for applicants and exempt project proponents (collectively referred to as project proponents) in need of wetland mitigation as compensation for wetland impacts regulated under Section 404 of the Clean Water Act and s. 281.36., Wis. Stats. This document applies to all project proponents[1] who are required to mitigate for impacts to wetland resources under federal and Wisconsin state laws.

Concurrent with the development of this document for project proponents, the agencies updated a companion document, *Procedures for Developing Wetland Compensatory Mitigation Sites in Wisconsin Version 2*. Please refer to that document for information on development of mitigation banks, in-lieu fee (ILF) programs and sites and permittee responsible mitigation (PRM) projects. Both documents provide updates to and replace the 2013 Wisconsin Mitigation Guidelines. Note, the agencies focus on compensatory wetland mitigation in this document and not compensatory stream mitigation. Please refer to the Corps' Stream Procedures for information on evaluating stream impacts and proposing compensatory stream mitigation.

2. Federal and State Wetland Mitigation Regulations

The federal mitigation rule, 33 CFR Part 332, establishes standards and criteria for the use of all types of compensatory mitigation, including the review of compensatory mitigation sites and factors that inform the Corps' determinations of the appropriate type and amount of compensation. The fundamental objective of any compensatory mitigation required by the Corps is to offset environmental losses resulting from federally authorized impacts to waters of the United States. The rule does not bypass the requirement that all Section 404 permits comply with the Section 404(b)(1) Guidelines, which means that project proponents must demonstrate all practicable avoidance and minimization of impacts to waters prior to a decision on the need for compensatory mitigation.

Wisconsin state law at s. 281.36, Wis. Stats., and ch. NR 350, Wis. Adm. Code, set out criteria for when DNR will require mitigation, credit ratios for bank and ILF credit purchases, preferred mitigation alternatives, and processes for completing mitigation requirements.

[1] *This document applies to all applicants including the Wisconsin Department of Transportation. The Corps, DNR and WisDOT are developing a Memorandum of Understanding documenting past WisDOT bank approvals and memorializing future use of those grandfathered banks*.

3. When Compensatory Mitigation is Required

The State of Wisconsin

Wisconsin law requires that project proponents mitigate for wetland impacts under all individual permit applications. Project proponents who meet the criteria for a nonfederal exemption for wetlands over a certain size must also provide mitigation. If an exempt project is in an urban area, mitigation is required for any impacts above 10,000 square feet. If an exempt project is outside an urban area, mitigation is required for any impacts above 1.5 acres. With individual permits and qualifying exemptions, the department may determine that mitigation is also required for temporary or secondary impacts, taking into consideration timeframe of impacts, temporal loss of wetland functions, and wetland quality.

The Corps of Engineers

Under Section 404 of the Clean Water Act, the Corps has responsibility for determining if compensatory mitigation is necessary to offset unavoidable losses of aquatic resource function resulting from permitted activities. The Corps will evaluate permit applications and determine the need for wetland compensatory mitigation on a case-by-case basis by considering the potential individual, secondary/indirect, and cumulative adverse impacts to the aquatic environment resulting from the regulated activities. Under the Corps' applicable Nationwide Permits or Regional General Permits, the Corps will require compensatory mitigation necessary to ensure the authorized activity results in only minimal adverse environmental effects.[2]

The Corps will evaluate the duration of impacts, degree (i.e., severity) and scale of impacts, and the current quality of the wetland when determining if compensatory mitigation is necessary. Below are general guidelines on these key factors and likelihood that the Corps will require compensatory mitigation.

Duration:

- Is the proposed regulated impact temporary or permanent?
    - The Corps is more likely to require wetland mitigation for permanent regulated impacts, as these impacts are not restored to preconstruction conditions. A permanent discharge of dredged or fill material within a wetland may include changing a wetland to dry land, increasing the bottom elevation of a wetland, or changing the use or function of a wetland.
    - The Corps is less likely to require compensatory mitigation for temporary regulated impacts, provided the impacted wetlands are restored in a timely manner to

[2] *General condition #23 of the Corps' Nationwide Permits includes a compensatory mitigation requirement for all losses of wetlands that exceed 1/10-acre (4,356 square feet) and require pre-construction notification (PCN), unless the Corps determines that some other form of mitigation would be more environmentally appropriate or if the adverse environmental effects of the activity are no more than minimal without compensatory mitigation. Further, for wetland losses of 1/10-acre or less that require PCN, the Corps may determine on a case-by-case basis that compensatory mitigation is required to ensure that the activity results in only minimal adverse environmental effects.*

preconstruction conditions (including restoration of vegetation), contours, and elevations. However, the Corps may require compensatory mitigation to offset temporary impacts that are longer in duration with temporal loss of function that is more than minimal, for example, to include conversion of wetlands from one community type to another.

Degree and Scale:

- What is the acreage of impact(s) for the overall project?
    - When a Corps permit is required for a permanent discharge of dredged or fill material into wetlands, the wetland is typically lost via conversion to dry land, resulting in a total loss of wetland acreage and all functions.
    - The Corps is more likely to require wetland mitigation as the amount of wetland impacted and the overall loss of wetland function increases.
- Does the proposed activity impact one localized wetland area or several separate areas across a basin or across basins?
    - The Corps will evaluate the overall loss of wetland functions in all areas impacted and associated with a permit application.
    - If a proposal includes impacts to several separate wetland areas within the same overall project and watershed, such as in linear transportation or utility projects, the Corps will evaluate the overall net functional loss when deciding whether wetland mitigation is necessary.

Quality of Wetland:

- Will the proposed activity occur in a wetland that has a special designation? Examples of special designations include calcareous fens or wetlands providing critical habitat for a federally listed species. Is the wetland community rare or providing important water quality, habitat or other functions to the watershed?
- What is the current biological condition of the wetland? Examples of wetlands that are considered high functioning include those with low or limited invasive species presence, late successional communities (such as many forested communities), high species diversity, and those not currently affected by unregulated activities such as exempt agricultural and silvicultural activities.
    - If the impacted wetland is high quality and functioning well, the overall loss of functions caused by the proposed activity will be greater and the Corps is more likely to require wetland mitigation.
    - If current designations or data suggest that the wetland impacted is lower quality and not functioning well, the Corps will evaluate all other factors when determining whether compensatory mitigation is required.

Note that activities not regulated by the Corps have no Corps permit requirements and therefore no federal compensatory mitigation requirements. Further, projects eligible for authorization under Nationwide Permit 27 (Aquatic Habitat Restoration, Enhancement, and Establishment Activities) must result in increases in aquatic resource functions and therefore will have no compensatory mitigation requirements.

4. Identifying Appropriate Compensatory Mitigation for Your Impact

Once the agencies determine that a project proponent must provide compensatory mitigation to offset impacts, the project proponent must consider the following in their compensatory mitigation proposal:

1. Are there available bank or ILF credits to purchase that would offset the authorized impacts? Or will the project proponent propose PRM either because there are no bank or ILF credits or because PRM would be environmentally preferable? These questions relate to preference hierarchy, as further discussed below.
2. The location of the compensatory mitigation, i.e., if there are credits available at multiple banks or ILF sites, which one does the project proponent select? If PRM is the only option available or ecologically preferred, where does the project proponent propose construction and protection of the PRM project?
3. The functions provided by the wetland compensation, i.e., will the structural and functional characteristics of the compensatory mitigation site adequately offset the losses of wetland functions at the impact site?

A. Preference Hierarchy

To answer the first question about whether a project proponent will purchase bank or ILF credits or design, construct and protect a PRM site, it is important to consider the preference hierarchy. The federal mitigation rule and ch. NR 350, Wis. Adm. Code, outline general federal and state preferences for where and what type of compensatory mitigation is provided to offset impacts, and project proponents should familiarize themselves with both these rules. These rules establish a general preference for purchase of released bank credits over advance ILF credits,[3] and advance ILF credits over PRM, due to the generally increasing temporal loss and reduced functional benefits to the watershed with advance ILF credits and PRM. The agencies generally consider released ILF credits (or those "excess" credits generated after all advance credit sales have been fulfilled) as equivalent in preference to released bank credits as both are tied to an existing mitigation site that has been permanently protected and met administrative and ecological performance standards.

It is important to remember that this preference hierarchy is intended to be a guide and all compensatory mitigation decisions are made by the agencies on a case-by-case basis based on a variety of site and watershed specific factors, considering the information provided by the project proponent. In

[3] Advance ILF credits are approved and released prior to site identification, construction, protection, and monitoring.

some cases, a project proponent may provide the required compensatory mitigation from a source lower in the preference hierarchy, or a combination of sources, if they can demonstrate that it is environmentally preferable. The site's location within a service area and in relation to a HUC 8 watershed and whether the functions of the impacted resource are adequately offset by the proposed compensation are also considered when the agencies make decisions on what compensatory mitigation is appropriate and environmentally preferable, as further described below. Note that the cost of providing compensation from any of the three mitigation mechanisms cannot be used as justification for determining another mechanism environmentally preferable.

B. Location/Service Areas

To answer the second question, it is important to consider that Wisconsin is divided into three major watershed basins: Lake Superior, Lake Michigan, and Mississippi River. These basins are subdivided further to create twelve total mitigation service areas (Figure 1). Service areas follow USGS Basin Level 2 hydrologic units corresponding to modified 6-digit hydrologic unit codes (HUCs). Agencies delineated service areas to provide approximately equal spatial areas where feasible. Each service area is then broken down further into HUC 8 watersheds, which are considered smaller subbasins within the larger watershed (Figure 2).

Generally, the state preference is for the purchase of bank credits within the same HUC 8 watershed when an approved bank in that watershed has in-kind credits available to fulfill all or part of the compensation requirements. If a service area has multiple banks with available credits, but none individually contain a sufficient amount of appropriate credits, project proponents could propose to purchase their compensation from multiple sources. If a service area does not contain a sufficient amount of bank credits, project proponents could propose to provide a portion of their compensation from available advance ILF credits.

Agencies generally will not approve the purchase of bank or ILF credits or the development of PRM sites as compensatory mitigation outside of the service area where the impacts to wetlands are authorized. Applicants proposing PRM should propose PRM projects as close to the impact site as practicable within the service area, as s. 281.36., Wis. Stats. requires PRM projects to be completed within the same watershed or within a half mile of the discharge.

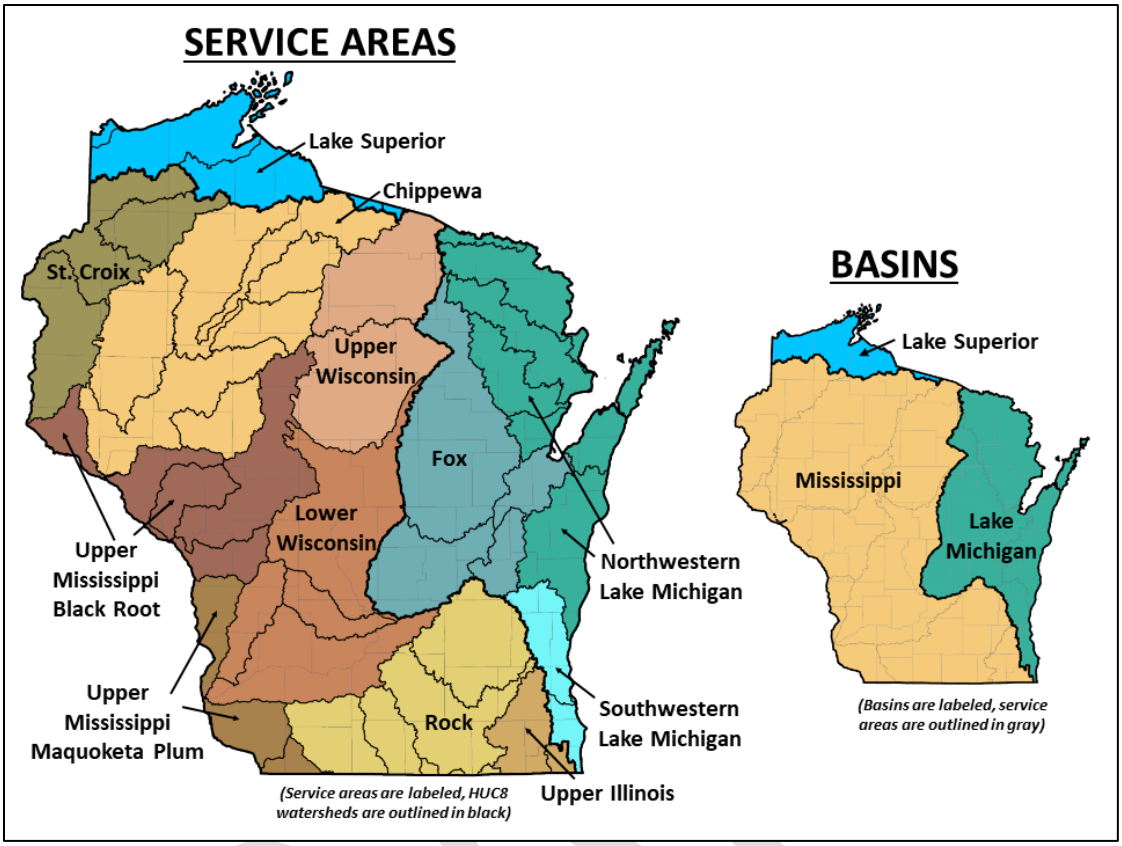


Figure 1: Wisconsin Mitigation Service Areas and Major Basins

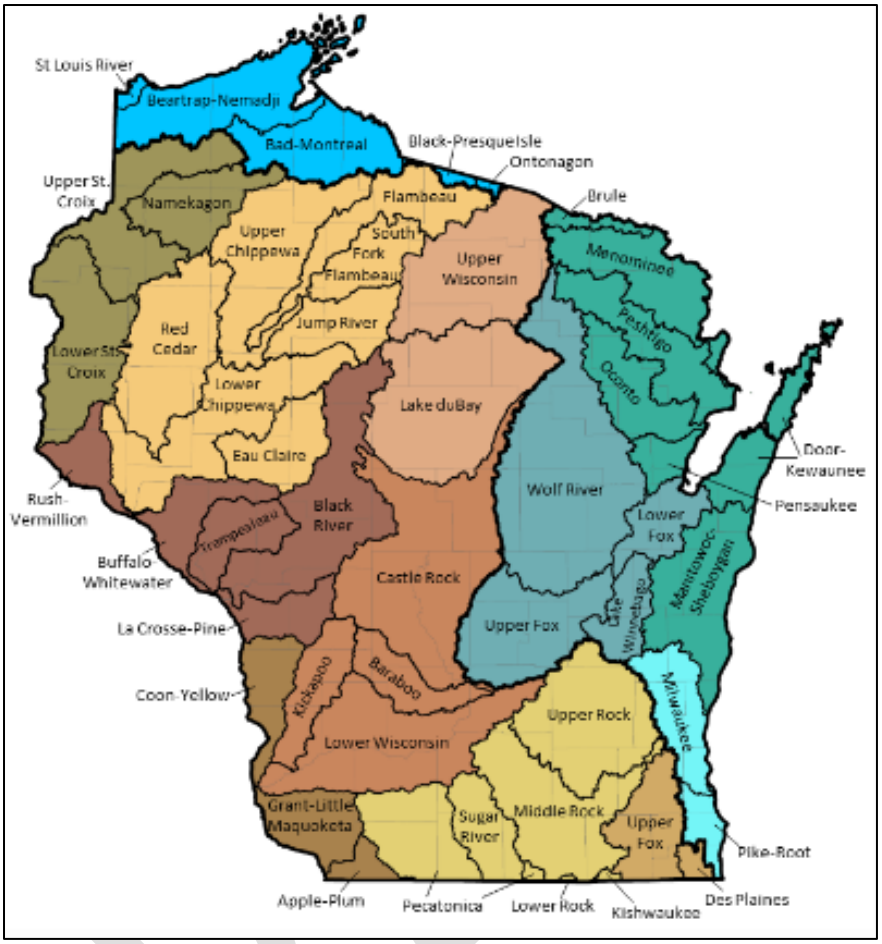


Figure 2: Wisconsin 8-Digit HUCs (Subbasins)

C. Functional Replacement

To answer the third question, it is important to assess whether the structural and functional characteristics of the compensatory site would adequately offset lost functions at the impact site by providing a similar suite of functions or similar functioning communities to the impacted wetland. The agencies have historically used and continue to use the Wetland Community vegetation descriptions adapted from Eggers and Reed (2011) to characterize functions. In the Version 1 guidance, the agencies adopted eleven wetland plant community types for use as in-kind classifications. For Version 2, the agencies have consolidated some wetland communities (Table 1) for easier credit tracking on mitigation sites, recognition of overlapping functions, and acknowledgement of their frequent presence in wetland complexes on sites. Specifically, the agencies have combined wet meadow plant communities into a single wetland and credit type as they are typically interspersed, are difficult to predict where and to what extent each will develop and are difficult to delineate for precise mapping and crediting over time.

Mitigation banks approved prior to these updated guidelines may have available wet meadow credits that were further classified as fresh wet meadow, sedge meadow, wet mesic prairie or fen. Project

proponents looking to purchase wet meadow credits can consider any of these sub-communities as in-kind.

Table 1: Wetland Community Types Considered In-Kind

Wetland Community	Includes
Wet meadow	Fresh (wet) meadow, sedge meadow, wet to wet mesic prairie, fen
Marsh	Shallow marsh, deep marsh
Shrub swamp	Shrub-carr, alder thicket
Wooded swamp	Hardwood swamp, coniferous swamp
Floodplain forest	Floodplain forest
Seasonally flooded basin	Seasonally flooded basin
Bog	Open bog, coniferous bog
Shallow, open water	Shallow open water

ILF advance credits for sale to project proponents will not have an associated plant community type because the mitigation project to offset impacts is typically identified and completed after the sale of credits. If agencies decide that ILF advance credit purchase is appropriate compensatory mitigation, project proponents would purchase general advance wetlands credits from the ILF sponsor.

In addition to considering whether the compensatory mitigation site would offset functions lost at the impact site, agencies may also take into account more holistically the functional needs of the watershed where impacts occur and whether the compensatory mitigation site is responsive to those needs (i.e., stressors in the watershed and whether the compensation site is responsive to particular stressor(s)). For example, the agencies can consider watershed assessments and priorities identified in local watershed plans developed by local watershed authorities, non-profits, the state, or other entities. Greater weight is given to watershed plans that align with the agencies' goals and are developed with consideration for current trends in habitat loss or conversion, cumulative impacts of past development activities, current development trends, the presence and needs of sensitive species, chronic environmental problems such as flooding or poor water quality, or other relevant data. The use of one or more approved ILF program compensation planning frameworks (CPF) is also appropriate and CPFs are considered watershed plans.

5. Determining the Amount of Compensatory Mitigation Required

The agencies determine the amount of mitigation required for project proponents on a case-by-case basis and must ensure the amount is commensurate with permitted impacts and sufficient to replace lost wetland functions, including direct and indirect effects caused by the impact. When a wetland functional or condition assessment method is available, such as the Wisconsin Rapid Assessment Methodology or other appropriate method, project proponents may use the results of such assessments to inform functional loss at the impact site, and this assessment can help inform the amount of required mitigation.

In the absence of a functional assessment, the agencies use ratios to determine the amount of required mitigation. The DNR's requirements start at no less than 1.2 credits per one acre of permanent direct impacts and the Corps requirements start at no less than 1.0 credit per one acre of permanent direct impacts and increase as deemed appropriate to ensure sufficient offset of lost functions. If both agencies require mitigation for an impact, the agencies coordinate and align requirements where possible to ensure project proponents satisfy both requirements while minimizing any conflicting requirements.

The agencies will require minimum mitigation amounts in scenarios when mitigation is in-kind, when the wetland impacted does not have a special designation, is not rare, subject to historic loss, or difficult to replace, when the mitigation is located in the same BSA of the impact, and when there is no temporal loss. The agencies may require a higher mitigation ratio when mitigation is out-of-kind, the impacted wetland is rare or difficult to replace, the mitigation is located outside the BSA of impact, or there is temporal loss. A typical increase is 0.25 for each variable, e.g., up to 1.45:1 or 1.7:1 total if the compensation is out-of-kind, or an additional 0.25 increase, up to 1.7 total, if the compensation is both out-of-kind and out-of-BSA, etc. Each of these variables that may require more mitigation than the minimum are discussed in more detail below.

Wetland Functional Quality and Community Types

Mitigation requirements will be set in part based on an evaluation of the lost function associated with the wetlands that will be impacted by authorized permits or exemptions compared with the functions provided at the compensation site. To account for lost wetland function and set mitigation requirements, the agencies may use a crediting system or an appropriate wetland functional or condition assessment if available. When an appropriate wetland functional assessment tool is not available, wetland community types are generally considered to provide similar functions when the same community is provided as compensation as that impacted, see Table 1 for reference. When the agencies approve an impact to a wetland community that is rare in the watershed, particularly difficult to replace and not available, or has a special designation, they will likely require increased compensation to offset the higher loss of functions.

Location in the Watershed

The agencies will require compensatory mitigation within the same watershed (HUC 8 or service area) as the impact. An increase in ratio due to location is generally not applied so long as the impact and compensation are located in the same HUC 8 or service area. In the rare event the purchase of credits outside the service area is approved by the agencies, such as situations where there are no private banks or ILF credits available and PRM is not a feasible option, the agencies will likely require an increased ratio to account for this loss of function to the impacted watershed.

Permanent Versus Temporary Impacts

As described above, when compensation is required for permanent impacts, a ratio of at least 1:1 for the Corps and 1.2:1 for the DNR is required. When compensation is required for temporary impacts, the agencies generally will require compensation at a ratio less than their starting ratios for permanent impacts. The agencies will determine the amount of compensation by considering the type and duration of the temporary impact, the quality of the impacted community type, and length of time before it is anticipated to return to pre-impact functional condition. Temporary impacts may include, but are not limited to, open trenching, timber mat placement, temporary clearing of vegetation such as a forested wetland clearing, or impacts to any wetland plant community that is dominated by native plant species. The agencies may also require mitigation at a reduced ratio for secondary impacts to wetlands when associated with a regulated impact. Secondary impacts may include, but are not limited to, conversion of wetland type, hydrologic impacts, changes in wildlife use due to habitat fragmentation or conversion, or the introduction or increase of invasive or non-native plant species to a wetland.

Potential Temporal Loss of Wetland Function due to Mitigation Source

The agencies require sufficient compensation to account for the temporal loss of functions that can occur between the time of impact and provision of compensation on the landscape. As discussed earlier, there is often a temporal loss of wetland functions associated with some compensation sources over others.

Because mitigation banks do not receive any credits until the site is approved, protected through a conservation easement, and financial assurances have been provided to guarantee construction and maintenance, the starting ratio for purchasing mitigation bank credits is generally 1 or 1.2 credits per one acre of direct impacts, depending on the agency. As described above, the agencies may require a higher ratio due to the purchase of mitigation bank credits of an out-of-kind community, credits from a different service area than where the wetland impacts occur, to offset temporal loss of wetland function, or to fully compensate for impacts to wetland function or acreage. When the source of mitigation is ILF advance credits, the DNR will generally require a minimum of 1.45 credits per one acre of direct impacts due to the greater temporal loss of functions. Conversely, if the source of mitigation is released ILF credits, the DNR will generally not increase the amount of required mitigation.

When compensation is provided through a PRM site, the agencies must consider whether there will be a temporal loss in providing a fully functioning PRM site compared to when the impact will occur. For example, if a project proponent secures, protects, constructs and meets all performance standards prior

to the authorized impact, the agencies could determine there will be no temporal loss and not increase the required mitigation. However, typically PRM sites are protected and constructed concurrently with the impact and monitored for five or more years beyond that until performance standards are met. As a result, most PRM sites result in a temporal loss and therefore agencies will generally increase the amount of required mitigation.

6. Purchase of Compensatory Mitigation Credit

A. When to Purchase Credits

Project proponents must purchase wetland credits prior to initiating the authorized work permitted by either agency. The DNR generally requires project proponents to purchase wetland credits prior to state permit issuance during the permitting period of a proposed project; this ensures that a project fulfills the required mitigation permit requirements prior to the impact occurring. The DNR may allow project proponents to purchase credits after permit issuance if the permit has a condition that mitigation will be completed prior to discharge, while the Corps generally conditions permits to require credit purchase before authorized impacts and does not require credit purchase before permit issuance. Project proponents are responsible for engaging with both agencies as needed during the application review process to ensure that any wetland credits purchased prior to Corps permit issuance will meet the permit conditions of both agencies.

B. RIBITS and State Credit Ledgers

To track credit availability for use under state and federal permits, the Corps and the DNR each keep a publicly viewable ledger for each bank and ILF program. The Corps' public ledger also documents the credits released and sold by community type, date, permit/file number, and project proponent/purchaser. The agencies routinely conduct quality assurance reviews to ensure the state and federal ledgers match and that all withdrawal entries are documented.

Prior to initiating the authorized work and prior to finalizing the purchase of credits from any ILF or bank sponsors, it is the project proponent's responsibility to ensure that:

- ✓ They know what type and amount of credits are required to satisfy both agencies requirements.
- ✓ They have reviewed the Corps and State ledgers to ensure that the amount and type of credits they need as compensation for their state and federal permits are both approved and available in those ledgers.
- ✓ All affidavits are finalized, submitted to, and approved by the agencies.
- ✓ They retain copies of all affidavits for their records.

Project proponents can find the Corps' ledger for mitigation banks and ILF sites on RIBITS. Project proponents can find the state ledger for mitigation banks and ILF sites at https://dnr.wisconsin.gov/topic/Wetlands/mitigation/bankingRegistry.html and https://dnr.wisconsin.gov/topic/Wetlands/wwct/credits.html#process. Withdrawal affidavits are not uploaded as publicly visible, and the purchase price is not shown in either ledger.

C. Credit Affidavit of Purchase

An affidavit of credit purchase should include the following information at minimum:

- ✓ Date of sale.
- ✓ Bank/ILF Site Information:
  - Name of individual mitigation bank or ILF program.
- ✓ Project/Impact Site Information:
  - Name of the project proponent (and authorized representative if the project proponent is a company, non-profit, agency, etc.).
  - Project Name.
  - Project impact location, Including township, range, section, and municipality.
  - HUC 8 watershed and service area name where the authorized impact will occur.
  - Relevant Corps and/or DNR permit numbers or exemption numbers.
  - Acreage of impacts by wetland community type, if applicable.
- ✓ Credit ratios applied and number of credits sold for each affected community.
- ✓ Community types of the mitigation bank credits sold (not required for ILF credits).
- ✓ Final credit amount(s).
- ✓ Printed names of both the project proponent or exempt project proponent and Mitigation Bank Sponsor.
- ✓ Signatures of both the project proponent or exempt project proponent and Mitigation Bank Sponsor.

Project proponents or sponsors must immediately submit executed affidavits to both the Corps at WisRIBITS@usace.army.mil and the DNR Wetland Mitigation Coordinator (see DNR mitigation bank webpage).

7. Legal Responsibilities of the Project Proponent and the Sponsor

A. Permit Conditions and Requirements

When compensatory mitigation is required, the agencies will include special conditions to their permits that specify the type, amount and timeline under which the project proponent must provide the mitigation. These special permit conditions will vary depending upon the authorizing agency, mitigation alternative proposed and approved for use, and type of permit authorization (or state exemption) required.

When compensatory mitigation is provided through PRM, responsibility for site protection, operation, maintenance, and long-term management stays with the project proponent. The project proponent prepares a Mitigation Plan that is reviewed and approved by the agencies and incorporated as a condition of the permit authorizing the impact. Project proponents proposing PRM should refer to the Procedures for Developing Wetland Compensatory Mitigation Sites in Wisconsin for information on mitigation plans and site reviews.

Permit conditions for PRM sites generally:

- ✓ Describe the PRM site and reference the approved mitigation plan, included as an enclosure of the permit.
- ✓ For an Individual Permit from the Corps, the project proponent must submit a final mitigation plan and the Corps must approve that plan prior to permit issuance.
- ✓ In contrast, for General Permits from the Corps, the project proponent may submit the mitigation plan and receive approval prior to verification, or the project proponent may submit the mitigation plan after verification and must receive Corps approval of that plan prior to beginning authorized work.

- ✓ Identify the party responsible for completing the work associated with the PRM site and ensuring site success.
- ✓ Describe any other requirements not otherwise specified in the approved mitigation plan, such as:
  - Site objectives.
  - Required monitoring methods, timeline, etc.
  - Performance standards associated with compensatory mitigation.
  - Required construction and maintenance financial assurances (amount, mechanism, beneficiary, timeline, release schedule).
  - Long-term management provisions, including any required funding.
  - Timelines for completion of construction, seeding and planting.
  - Timelines for recording of the site protection mechanism.

When compensatory mitigation is provided through the purchase of available bank and ILF credits, responsibility for ensuring site success remains with the project proponent only until they finalize and demonstrate purchase of credits. Permit conditions for bank and ILF credits generally:

- ✓ Clarify the party responsible for purchasing credits.
- ✓ Identify the specific mitigation bank or ILF program (or ILF site if released credits are purchased).
- ✓ Specify the number and type of credits required.

B. Transfer of Mitigation Liability

When compensatory mitigation is provided through the purchase of bank or ILF credits (released or advance), an affidavit of credit purchase is used to document a legal transfer of mitigation responsibility from the project proponent to the sponsor. The affidavit shows that a project proponent has secured the appropriate amount and type of credits from a mitigation bank or ILF program sponsor. When a credit purchase is made, the legal responsibility for providing the mitigation is assumed by a sponsor. The project proponent retains the legal responsibility for submitting an affidavit of credit purchase to the agencies, retaining documentation of the credit purchase, and complying with all other conditions of the state and federal permits.

US Army Corps of Engineers ®
St. Paul District

WISCONSIN DEPT. OF NATURAL RESOURCES

Wisconsin Mitigation Guidelines
Procedures For Developing Wetland Compensatory Mitigation Sites in Wisconsin
Version 2

July 2024

Table of Contents

1. Background and How to Use the Wisconsin Mitigation Guidelines

The U.S. Army Corps of Engineers, St. Paul District (Corps) and the State of Wisconsin Department of Natural Resources (DNR) updated these guidelines to provide an overview of the mitigation programs for mitigation bank sponsors, in-lieu fee (ILF) site sponsors, and permittee-responsible mitigation (PRM) project proponents (collectively referred to as sponsors) in developing, constructing and protecting mitigation sites to offset impacts to wetland resources authorized under the federal Clean Water Act s. 404 and s. 281.36., Wis. Stats. This document applies to all sponsors[1] who intend to propose, construct, monitor and protect either a bank, sites in an ILF program or PRM site, and are doing so under federal and Wisconsin state laws.

Concurrent with the development of this document for sponsors, the agencies updated a companion document *Procedures for Project Proponents Seeking Wetland Mitigation* (link below), which includes information on the process of identifying and purchasing appropriate mitigation credits. The agencies have developed additional procedural documents (links below) to assist sponsors with planning, designing, constructing, and monitoring of mitigation projects to ensure they meet the requirements of the 2008 Federal Mitigation Rule, at 33 CFR Part 332, and ch. NR 350, Wis. Adm. Code. Further, while this document primarily focuses on wetland mitigation, when sponsors are interested in proposing stream mitigation, they should refer to the Corps Stream Procedures (link below) for additional information on how to plan, construct and monitor stream mitigation projects.

[1] *This document applies to all sponsors including the Wisconsin Department of Transportation. The Corps, DNR and WisDOT are developing a Memorandum of Understanding documenting past WisDOT bank approvals and memorializing future use of those grandfathered banks*.

2. Wetland Mitigation in Wisconsin

A. The Watershed Approach to Wetland Mitigation

The agencies use a watershed approach to wetland mitigation with the goal of approving mitigation projects that will be ecologically sustainable while maintaining and improving the quality and quantity of wetland resources in watersheds. When considering sites for mitigation, sponsors or applicants proposing PRM should review site selection by considering landscape attributes that will help provide the desired wetland resource types and ensure they are self-sustaining. Available information to inform the watershed approach may include current trends in habitat loss or conversion, cumulative impacts of past development activities, current development trends, the presence and needs of sensitive species, site conditions that favor or hinder the success of mitigation projects, chronic environmental problems such as flooding or poor water quality, site specific conditions, and other relevant data. Mitigation proposals informed by a watershed approach should not focus exclusively on specific wetland functions (e.g., water quality or habitat for certain species), but should provide, where practicable, the suite of functions typically provided by the affected resources. Sponsors should consider and propose protection and maintenance of terrestrial resources, such as non-wetland riparian areas and uplands, for agency consideration when those resources contribute to or improve the overall ecological functioning of wetland resources in the watershed.

When looking for sites that may be appropriate as compensatory mitigation, bank and ILF program sponsors should contact local watershed authorities, non-profits, and the DNR to identify any existing watershed plans available within the area or service area of interest. Watershed plans do not need to cover the entire service area to provide valuable insights into impact trends, watershed needs, available sites, wetland functions under threat, etc. Sponsors and PRM proponents can view multiple watershed plans to select sites. Greater weight is given to watershed plans reviewed and approved by the Agencies. Using one or more approved ILF program compensation planning framework (CPF) is also appropriate and considered a watershed plan.

Where a watershed plan is not available, or where an existing watershed plan is outdated or does not provide relevant information, sponsors may review and compile watershed-level data themselves to document that they are proposing a compensatory mitigation site under a watershed approach.

B. Mitigation Service Areas

Wisconsin is divided into three major basins: Lake Superior, Lake Michigan, and Mississippi River. Basins were subdivided further to create twelve total mitigation service areas (Figure 1). Service areas follow USGS Basin Level 2 hydrologic units corresponding to modified 6-digit hydrologic unit codes (HUCs). Agencies delineated Service Areas to provide approximately equal spatial areas where feasible. Each service area is then broken down further into HUC 8 watersheds, which are considered smaller subbasins within the larger watershed (Figure 2). When regulatory agencies authorize discharge impacts to a wetland, agencies consider the HUC 8 watershed, the service area, and the basin for mitigation requirements. Applicants should fulfill mitigation in the same

HUC 8 watershed or service area as the wetland impacts.[2] The agencies base mitigation bank credit availability on service area location as written in an approved mitigation bank instrument (MBI). ILF program advance credits availability will also be approved by service area, although a single ILF program can operate in multiple service areas. Sponsors providing PRM should complete PRM projects as close to the impact site as practicable; agencies generally will not approve mitigation outside of the service area where the impacts to wetlands are authorized.

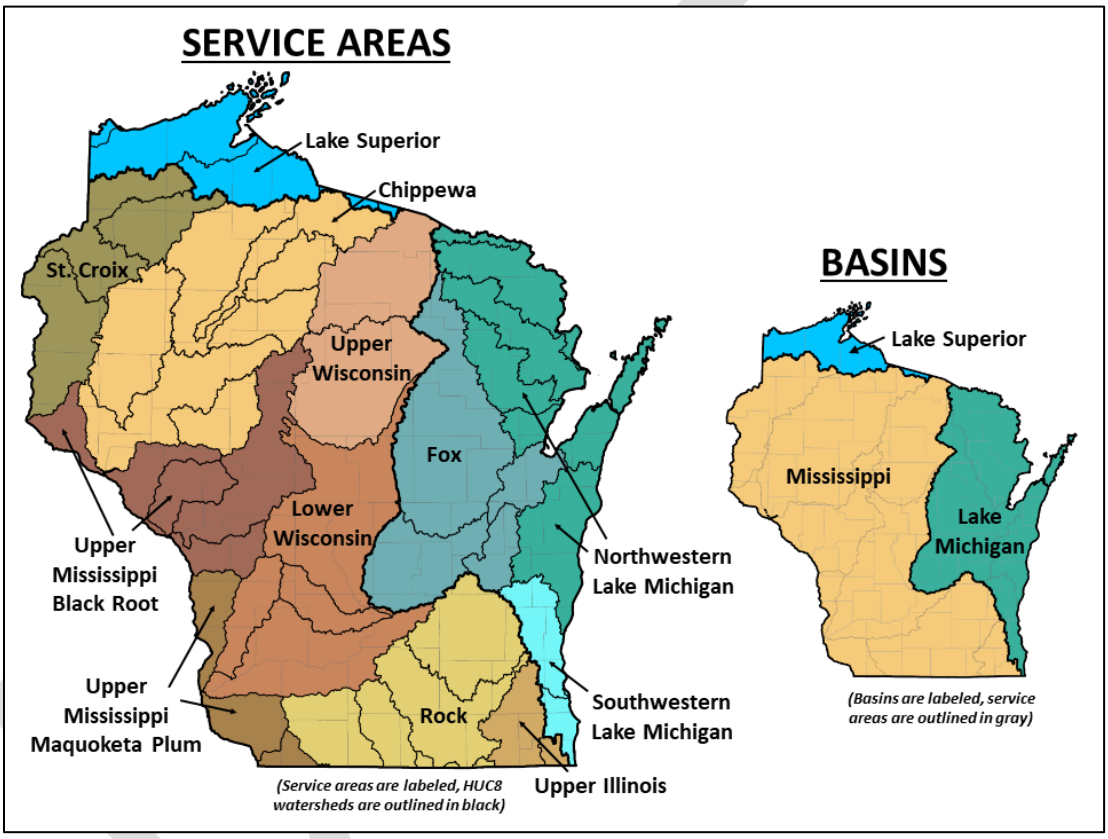


Figure 1: Wisconsin Mitigation Service Areas and Major Basins

[2] Generally, the state preference is for the purchase of bank credits within the same HUC 8 watershed when an approved bank in that watershed has in-kind credits available.

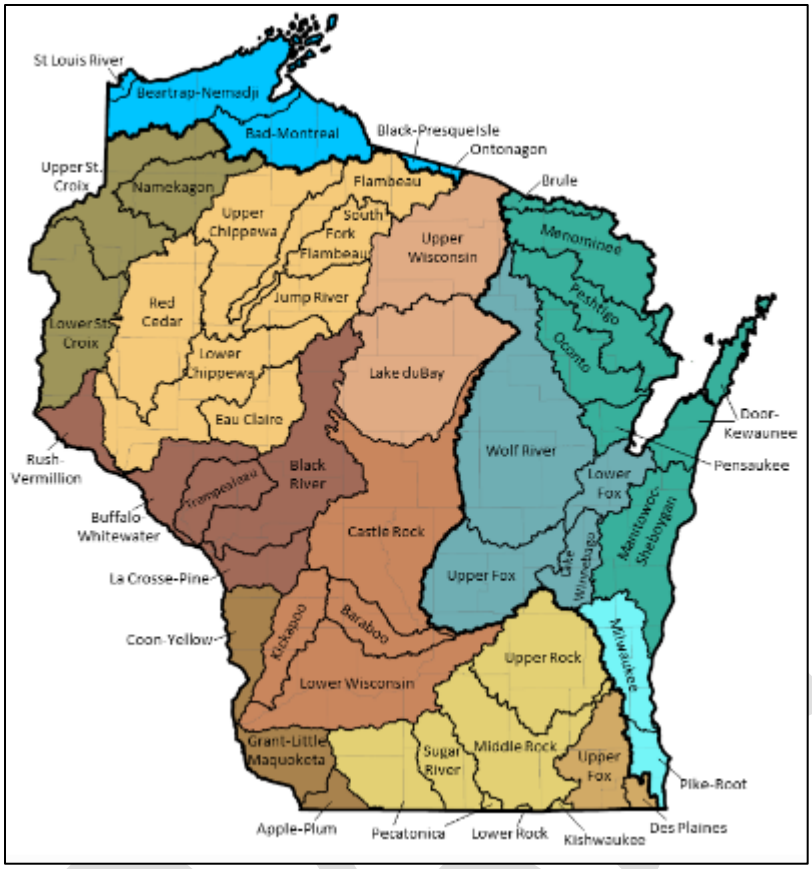


Figure 2: Wisconsin 8-Digit HUCs (Subbasins)

C. Wisconsin Mitigation Alternatives

i. Mitigation Banks

Background

Mitigation bank projects involve the restoration, enhancement, creation, and/or preservation of wetlands to produce mitigation credits. Sponsors may sell released credits to project proponents who have applied for or received federal or state wetland permit(s) or a state exemption and are required to mitigate to offset authorized wetland impacts. Any qualified person, business, non-profit organization, or public entity may sponsor a bank.

When agencies approve general use mitigation banks, sponsors may sell released mitigation credits to any project proponents impacting similar functioning wetlands in the designated service area where the agencies require compensation. In contrast, when agencies approve single client mitigation banks, released credits are used by a single client (typically, but not necessarily, a public entity).

A bank sponsor is responsible for establishing and operating a mitigation bank, which includes the sale of credits from their mitigation bank. The project proponent retains responsibility for providing the compensatory mitigation until they have secured the appropriate number and cover type of credits from an approved bank and the permitting agencies have received documentation that confirms that the bank has accepted the responsibility for providing the required compensatory mitigation. Once completed, the bank assumes responsibility for the project proponent's compensatory mitigation requirement.

Development Timeline

The development and approval process for a bank requires sponsors to submit detailed and complete information for all phases, to include an (optional) draft prospectus, prospectus, draft mitigation bank instrument (MBI) and final MBI phase. Sponsors who submit accurate and complete information for each phase, including adequate responses to agency comments from each previous phase, can expect to receive agency feedback within 30 days of receipt of a complete draft prospectus, within 90 days of receipt of a complete prospectus and within 90 days of receipt of a complete draft MBI, and can expect to receive final approval within 45 days of receipt of a complete final MBI.

The total timeline for the review and approval process depends largely on the complexity of the project, and also how much time the sponsor takes to adequately respond to the initial evaluation letter (that is sent to the sponsor by the Corps following review of the proposal with the Interagency Review Team, or IRT) and status update letter (that is sent to the sponsor by the Corps following receipt of the DMBI with the IRT). Incomplete submittals or complicating variables like concerns with engineering design, lack of adequate baseline data, potential off-site hydrology impacts, title encumbrances, adjacent incompatible land uses, etc. may lead to longer process times. In contrast, sponsors who select sites that avoid fatal flaws and have characteristics that are likely to lead to ecologically successful and sustainable sites in the long-term will be more likely to move efficiently through the review process than sponsors who select sites containing one or more fatal flaws or sites that may have challenges in achieving ecological success and long-term sustainability. Sponsors should be aware that agency approval of a proposed mitigation bank is not guaranteed, and the agencies assess approval potential at each review phase based on the information provided by the sponsor. Again, sponsors proposing sites that avoid fatal flaws and sponsors who submit complete and accurate submittals will be more likely to efficiently receive approval of their MBI.

The final MBI is a legal agreement between the bank sponsor and the agencies, outlining the roles and responsibilities of each in the operation, monitoring, management, and long-term protection of the bank. Once an FMBI receives final approval from the Corps after coordination with the IRT, the first credit release is an administrative based release that typically occurs following establishment of the conservation easement, title insurance, and provision of financial assurances. The majority of credits are performance based and are released by the agencies at milestones provided in the MBI, including when construction and planting are completed and when monitoring demonstrates the site meets approved performance standards.

The MBI includes the mitigation plan (MP),[3] which describes details of site preparation, construction, seeding and planting, maintenance, monitoring, credit releases, and reporting. Construction may take a year or more, depending on the site needs, timing, and the approved mitigation plan. Sponsors must be aware that consistent with all final MBIs, they must complete construction no later than 3 years following bank approval. Sponsors must complete and submit an as-built report following completion of construction, and typically will receive another credit release at this milestone consistent with the credit release schedule in the MBI.

Maintenance and monitoring is then required typically for at least 5 full growing seasons after completion of construction for herbaceous wetland communities, and up to 10 years for wooded communities. Sponsors must complete and submit annual monitoring reports to document whether performance standards have been achieved and support a credit release. If performance standards are not met at the end of the planned monitoring period, agencies will likely require sponsors to continue with site maintenance and monitoring until required performance standards are met. The agencies release mitigation bank credits following the approved credit release schedule based on achievement of performance milestones. See Section 6 for details.

The full operating life of a mitigation bank, meaning the time from agency approval of the bank to release from monitoring and sale of all released credits, may last more than twenty years. After release from the monitoring period, sponsors may continue to sell mitigation credits until all released credits are sold; depending on the service area and development trends, it may take ten or more years for a sponsor to sell all released credits and close the bank to further sales. Agencies require long-term management of a bank after release from monitoring, and sponsors are required to take actions identified in the MBI and necessary to ensure ecologically sustainability and success of the project in the long-term.

[3] The mitigation plan is synonymous with the compensation site plan as described under ch. NR 350, Wis. Adm. Code.

The agencies encourage sponsors to do the following to help ensure effective agency review of their proposals:

Understand the Process

- Familiarize yourself with the process, requirements and standards outlined here and in the 2008 Federal Mitigation Rule, at 33 CFR Part 332, and ch. NR 350, Wis. Adm. Code.

Take Care with Site Selection

- Ensure your first submittal (draft prospectus or prospectus) discusses how your site avoids or will resolve all potential fatal flaws listed in Section 1 of the Site Selection Criteria Checklist, Appendix A.

Project Management Timeline

- Develop Project Management (PM)Timeline that incorporates the Federal and state review process timelines (Appendix B), including a reasonable buffer beyond the timeline goals.
- Account for seasonal constraints for data collection and agency site visits.
- Build in additional site-specific project review needs, such as cultural resources reviews and surveys, Bureau of Aeronautics and airport coordination, potential site redesign, etc.

Complete Submittals

- Ensure every submittal includes and thorougly documents the information required in Appendices C and D.
- Make all changes (throughout your submittal) required in each Corps comment letter received.
- Utilize the most recent MBI template (Appendix E).

Prevent Revision and Resubmittal

- Identify potential fatal flaws early that could delay site approval. Ensure your submittal includes detailed plans for resolving those fatal flaws.
- Concept level designs are acceptable at prospectus, but draft MBIs must include your proposed final design and construction plans.
- Thorougly document baseline site conditions (such as drainage infrastructure and its effects), the level of functional lift your design will provide, and how that supports your proposed credit ratios.

Site Operation and Management

The agencies approve banks in response to demonstrated need in a service area, current site selection criteria and design practices, which can and do change and evolve. Therefore, sponsors must provide site protection and complete construction and planting as approved in the MBI within no more than three years of MBI approval, preferably sooner. In addition, as most Wisconsin bank sponsors receive a maximum 10% initial release prior to construction with the provision of financial assurances, this 3-year timeline ensures wetland impacts are offset by the purchase of mitigation bank credits on a somewhat

parallel timeline, minimizing the temporal loss of wetland function. Because mitigation banks operate within this construction timeline, mitigation bank credits are generally preferable to ILF program advance credits or PRM projects to offset authorized impacts.

Sponsors should design sites to be self-sustaining with minimal structures or features needing maintenance. After construction and initial planting, bank sponsors conduct site-specific maintenance activities, often including supplemental native seeding and planting and mowing, spraying, or burning to reduce non-native invasive populations. Agencies require annual mitigation site monitoring reports for a minimum of five years. The agencies use these monitoring reports to determine if the MBI performance standards are met and whether to release additional mitigation credits to the bank sponsor.

ii. In-Lieu Fee Program and Sites

Background

An ILF program is an alternative mechanism for providing mitigation credits to project proponents. Like banks, ILF programs provide wetland restoration, enhancement, creation, and/or preservation projects to produce credits for sale to project proponents to offset authorized wetland impacts. ILF programs are authorized to sell advance credits to project proponents prior to completing mitigation projects. Because the advance credits are sold before constructing mitigation on the ground, there is temporal loss of wetland function with ILF program projects and Wisconsin DNR increases credit ratios to offset this temporal loss. In contrast to mitigation banks, only governmental or non-profit entities may serve to sponsor an ILF program (ILF sponsor). ILF programs and their operations are regulated by an ILF program instrument, which includes a compensation planning framework (CPF) for each service area. The CPF is essentially a watershed plan that includes a prioritization strategy, detailing how the sponsor will locate the sites and develop projects using a watershed approach. The ILF program instrument also describes how the sponsor will set advanced credit fees. It outlines how the program will be funded, its service areas of operation, and the number of advance credits approved for sale in each service area, among other process and operation language.

ILF programs develop mitigation sites through the sale of advance credits. After an ILF program instrument receives agency approval, the sponsor may sell advance credits to project proponents in identified service areas under the same conditions as mitigation banks (similar functioning wetlands, in the same service area as the impact, etc.) When the ILF sponsor sells credits, the legal responsibility for providing the mitigation is assumed by the sponsor. As with banks, the project proponent retains the legal responsibility for securing documentation of the credit purchase and for complying with all other conditions of the state and federal permits. The sponsor then uses funds from credit sales for a mitigation project in the same service area where they sold the credits. An ILF program aims to deliver successful mitigation sites and receive released credits to fulfill its legal responsibility for previously authorized wetland impacts.

Development Timeline

As with mitigation banks, the review and approval of an ILF program involves numerous regulatory steps. The review process of the ILF program instrument includes several submittal phases and complex budget and legal matters, as well as technical wetland restoration, monitoring and management issues. The ILF program instrument requires compensation planning frameworks (CPF) for watersheds in service areas where the sponsor proposes advance credit sales. Developing individual CPFs requires significant stakeholder engagement and meeting facilitation to collect input and priorities. The complete ILF program instrument development process may take several years prior to agency authorization to sell advance credits.

The timeline for review and development of individual sites in the ILF program parallels that of individual mitigation banks. ILF mitigation projects are developed following the same process and requirements as mitigation bank sites except:

1. They are identified and prioritized following the prioritization strategy in the CPFs.
2. They are developed using advance credit fees collected.
3. Sites must be identified, approved (including the Corps review process) and constructed/planted within 3 growing seasons of the associated advance credit sale.
4. Advance credit fee use information is provided to the agencies during the review process.

In addition to the items listed for bank sponsors in 2ci above, for ILF sites, sponsors should do the following to ensure they meet the three (3) growing season deadline for completing initial biological and physical improvements:

- Ensure your prospectus submittal clearly discusses how the site selection provides for the goals and priorities identified in the relevant CPF.
- Continually seek out potential sites, even before you sell advance credits, and keep a list of potential sites and partnership opportunities. Remember you only have three growing seasons to fulfill each advance credit sale; this realistically means you generally must already have site identification in the works before credit sales.
- Ensure you develop your process for requesting or seeking site proposals from the public and for ranking those proposals ahead of advance credit sales.
- Develop template contracts (between the ILFP and landowners, the Corps is not a party to these contracts) before the sale of advance credits in a service area. Ensure those contracts are in place before expending funds on site review.

Site Operation

After construction, ILF sponsors must conduct required maintenance activities, often involving invasive species control to include supplemental native seeding and planting and mowing, spraying, or burning to reduce non-native invasive populations. Sponsors must submit annual mitigation site monitoring reports for a minimum of five years. Agencies review these monitoring reports to determine if the required performance standards are met and whether to release advance mitigation credits to the ILF sponsor.

As ILF sites are approved and credits are released from the site, those releases first go toward fulfilling advance credit sales. In some cases, after the ILF sponsor has fulfilled all advance credits, an ILF site may generate excess credits. Because these credits would not have temporal loss associated with them, applicants could consider these as having equal preference to mitigation bank credits.

	Banks	ILFP
Who	Public or private sponsor	Sponsor can only be a government or non-profit convservation organization
Who	Corps approves site(s)	Corps approves ILF program instrument, which identifies how they'll prioritize and find sites. Corps then also approves ILF project site proposals.
What and when	Sponsor secures the site and initiates mitigation activities in advance of debits (credit sales). Corps releases credits for bank sponsor to sell after some milestone(s) is met.	Sponsor receives advance credits and often sells/collects fees from advance credit sales, before securing a site and initiating mitigation activities.
Where	single or multiple project sites	Typically multiple project sites over the life of the program
Why	First compensatory mitigaiton preference in Rule's hierarchy	Second compensatory mitigation preference in Rule's hierarchy
How	Site operation and management governed by Instrument	Program operation and management governed by Instrument. Instrument is modified each time a new site is added.
And sometimes why…	Corps has no oversight over bank revenue or expenditures	Corps reviews accounting, including revenues and expendatures

Figure 3: Comparison of Banks Versus ILF Programs

iii. Permittee-Responsible Mitigation

A Permittee-Responsible Mitigation (PRM) project is a wetland restoration, enhancement, creation, and/or preservation project, with the project proponent retaining full responsibility for developing and achieving successful mitigation standards. PRM sites are designed to compensate for single impacts by the project proponent and do not generate credits for sale or use by any other entity or project. The project proponent retains full control and responsibility for the PRM site.

PRM, whether on the same site as the impact or not, is lower in the preference hierarchy than bank and ILF program released credits. This is due to challenges like site identification, scale, and temporal loss. However, agencies may determine PRM is preferred to bank or ILF credits if conditions under 33 CFR 332.3(6) and s. NR 350.004(4), Wis. Adm. Code, are satisfied.

The agencies may consider multiple factors when reviewing proposed PRM mitigation sites to determine if a site is environmentally preferred. Sponsors should consider including the following factors in a PRM mitigation plan (33 CFR 332.4(c)(2)-(14), also included as a checklist in Appendix D, which will require detail and review commensurate with the size and complexity of the mitigation and impact sites:

1. Are in-kind wetland bank credits available within the service area? If they are, the applicant must demonstrate why the proposed PRM mitigation site is environmentally preferable using the other factors below.

2. Are ILF program released or advance credits available within the service area? If they are, the applicant must demonstrate why the proposed PRM mitigation site is environmentally preferable using the other factors below.
3. Does the PRM avoid all fatal flaw factors listed in the Corps site selection criteria checklist, list 1 (see Appendix A and Section 3.d. for more details)? Typically, the agencies will not approve mitigation sites until the applicant addresses all potential fatal flaws. For example, an applicant must resolve a severed mineral rights issue on a site before seeking project approval. For PRM mitigation sites, this also means that the applicant must identify a third-party conservation easement holder or demonstrate that another site protection mechanism is sufficient for protecting the site from conflicting land uses in the long-term.
4. Will the PRM mitigation site be constructed (earthwork and planting/seeding) and protected prior to the associated impact?
5. What location and site characteristics from the Corps site selection criteria checklist (lists 2 and 3) are met that make the PRM mitigation site likely to succeed in providing essential functions onsite and to the watershed?
6. Mitigation site size: A larger PRM mitigation site, when combined with other factors from this list, may be more likely to be self-sustaining than a smaller PRM mitigation site.
7. Mitigation Plan and Design Components:
    a. Proposal of sufficient upland buffer.
    b. Connectivity of wetland resources onsite.
    c. Protection from adjacent or other onsite property uses. For example, a site where the proposed PRM resources are intermixed with the proposed authorized impacts is likely less sustainable in the long-term and, therefore, less likely to be approved.
    d. The proposed wetlands will provide a similar suite of functions as the wetland functions that are being lost or impacted. For example, wet-mesic prairie wetlands may offer similar functions as sedge meadow or shallow marsh in a similar landscape setting, soil series, etc. However, that same wet-mesic prairie wetland may not provide functions comparable to a deep marsh or floodplain forest.
8. Condition of the impacted wetland.
9. Unique nature of the impacted wetland resource. For example, if the impact is to a unique floodplain wetland and the project proponent can demonstrate that they have a unique opportunity to restore, enhance, and preserve this resource that is unlikely to be achieved by a bank or ILF program, it may be environmentally preferable to do so.
10. Connectivity to other aquatic resources or conserved properties: Does the wetland site connect with and support other aquatic resources or conserved properties, amplifying its benefits to the watershed beyond that which is required to offset the authorized loss?

Below is a list of additional site considerations for applicants to consider when proposing the development of a PRM mitigation site:

1. A PRM project can be adjacent to the site of impact or at another location in the same watershed as the impact site.

2. For agency approval, the compensatory mitigation project must be practical for the applicant to design and develop and must be reasonably expected to achieve performance standards equivalent to the standards of bank and ILF sites. Demonstrating this often requires the project proponent to hire resource and engineering professionals to develop a mitigation plan that is scientific, detailed, and likely to be stable and sustainable in the long term.
3. Applicants need to provide a financial assurance guaranteeing construction, maintenance and monitoring of the PRM project.
4. Because PRM projects are often smaller than bank or ILF sites, proponents often face challenges finding a PRM project that is ecologically appropriate, provides a similar suite of functions and resources as the impacted site, and ensures the mitigation site has the potential to offset authorized impacts.

3. Requirements for All Mitigation Alternatives

The following subparts include important information on the legal and financial aspects of any bank, ILF and PRM project. Sponsors must know whether and how their site can meet these expectations and needs before engaging the agencies in the project review process. Sponsors should discuss how they will manage these aspects of a project in their site submittals and mitigation plans.

A. Site Sponsorship and Ownership or Property Interest

The agencies require the identification of a single mitigation sponsor or PRM project proponent for mitigation site approval. Only the sponsor can sign the MBI and sell credits for banks and ILF programs. There is no instrument for PRM projects, but the project proponent is required to prepare a Mitigation Plan that is reviewed and approved by the agencies and incorporated as a condition of the wetland permits. The sponsor or project proponent can either be an individual or other single entity, such as but not limited to an incorporated company, a limited liability corporation (LLC), a non-profit or a government organization.

If the sponsor is an LLC, additional information on the LLC is required as part of the site proposal, due to the legal rights and responsibilities for LLCs built into state law. LLC sponsors should provide the following information to the agencies as early as possible during the review process:

1. Articles of Organization.
2. Documentation of who may sign for the LLC. Generally, each member is an agent of the LLC, unless the management of the LLC is vested in a manager, in which case only the managers act as agents for the LLC.
3. Operating Agreement, if one exists, though this is not required in Wisconsin.
4. Proof of property interests held by the LLC.

To sign the final MBI or receive PRM site approval, the sponsor or project proponent must demonstrate they have sufficient property interest in a proposed mitigation site and can legally operate and manage

the site in compliance with the MBI or mitigation plan. The most common forms of property interest accepted by the agencies are listed below:

1. **In-Fee Title Ownership**: The most commonly proposed property interest is when the proposed sponsor holds in-fee title ownership over the proposed mitigation site. Sometimes a sponsor or project proponent may own part of a site and use one of the other mechanisms below to demonstrate property interests over land they do not own.

2. **Holds an Easement**: A sponsor or project proponent may hold an easement over all or a portion of a compensatory mitigation site. This is most common when the sponsor or PRM project proponent is an incorporated company or LLC that obtains easements from individual landowners or when multiple landowners form an LLC to develop a mitigation bank, granting easements to the LLC during formation. Sponsors must provide the draft easements granting these rights to a sponsor for agency review before execution. Once executed, the easement must be recorded with the County. For bank and ILF sponsors, documentation of recording is required before the initial release of credits.

3. **Other**: There may be other forms of acceptable property interest. Sponsors seeking an alternative should meet with the agencies as soon as possible to discuss its acceptability.

Proof of any of the above property interests is required during the review of all mitigation sites, and the sponsor or project proponent should provide this documentation as early as possible. If long-term management (LTM) is required, the long-term manager must also be able to identify property interest if the manager differs from the sponsor.

A sponsor or project proponent must also separately provide permanent mitigation site protection by granting a conservation easement or comparable legal instrument to the DNR. This is different from the easement discussion above in Item 2. Site protection and the conservation easement acquisition process are discussed below in Section 4. However, be aware that only the in-fee title owner of a site can grant a conservation easement. This means that if any of the other property interest options above apply, the sponsor or project proponent must ensure that the property owner is willing and able to grant a conservation easement.

In cases where the landowner and the easement holder would be the same entity (such as DNR or WisDOT), or the project is on federal land, the sponsor may propose using an alternative site protection mechanism, such as a restrictive covenant.

Should the proposed sponsorship of a site change, the new sponsor must be able to assume all responsibility for the site and obligations in the Instrument and all the conditions outlined above. Once the new sponsor has demonstrated to the agencies that they have or will have the ability and property interests needed to take over bank sponsorship, a simple transfer of the MBI (template) is required. The new sponsor then retains all rights to sell any available credits.

B. Financial Assurances

Background

In Wisconsin, the agencies require financial assurances for construction, monitoring and management activities on a mitigation site when the credit release schedule allows for the release of initial credits upon MBI approval and site protection, and before completion of construction. Financial assurances are also required to ensure that the sponsor successfully completes the project in accordance with a MP, including meeting performance standards. The agencies and sponsor or project proponent will work together to determine the specific needs for a mitigation proposal.

The agencies will require financial assurances for a mitigation site based on the size and complexity of the project, the degree of completion and performance of the mitigation project compared with the impact(s) requiring compensation, the likelihood of success, the past performance of the sponsor, and any other factors the agencies deem appropriate.

Financial assurances may be in the form of performance bonds, escrow accounts, casualty insurance, letters of credit, legislative appropriations for government sponsored projects, or other appropriate instruments, subject to the approval of the agencies. When proposing financial assurances in an MBI or PRM proposal, sponsors should secure quoted costs that are fair-market value of the materials and services that would be needed, including a detailed itemization of the expenses for construction, seeding and planting, maintenance, and monitoring. Quotes must also account for inflation that may occur during the 3-year allowable construction period. In determining the assurance amount, the agencies shall also consider the cost of providing replacement mitigation (i.e., identification and development of a new mitigation site in the event of approved site failure), including costs for land acquisition, planning, engineering, legal fees, mobilization, construction, and monitoring.

Financial assurances (excepting legislative appropriations) shall be payable to the "State of Wisconsin, Department of Natural Resources." If the project site or the mitigation bank is transferred, the new owner or successor in interest shall provide the necessary financial assurance in the amount required by the Wisconsin DNR for the project.

Financial institutions providing assurance must be registered with the Wisconsin Department of Financial Institutions or can provide documentation that they are authorized to do business in the state of Wisconsin.

Process

Sponsors should utilize the approved agency financial assurance template whenever possible. Agencies discourage changing the template language. If sponsors think they need to change template language for their specific project, they must propose changes to the agencies with a rationale for review.

Sponsors can phase out construction and maintenance financial assurances once the agencies have determined that the compensatory mitigation project is successful in accordance with its performance standards. The permit and Mitigation Plan or MBI specifies the conditions under which the financial

assurances are to be released to the project proponent, sponsor, and/or other financial assurance provider, including, as appropriate, linkage to achievement of performance standards, adaptive management, or compliance with special conditions.

A financial assurance must be in a form that ensures that the agencies will receive notification at least 90 days in advance of any termination or revocation. For third-party assurance providers, this may take the form of a contractual requirement for the assurance provider to notify the permitting agencies at least 90 days before the assurance is revoked or terminated. Mitigation bank sponsors must deliver a replacement for financial assurance at least 30 days before cancellation or modification of the existing financial assurance. The DNR will then notify if the replacement is acceptable. If not, the original financial assurance remains in effect.

Alternatives

Alternatives to financial assurances may be available that ensure a high level of confidence that the sponsor will complete the compensatory mitigation project and the project will achieve performance standards, or be on a trajectory to success, before the associated authorized impacts. For example, a mitigation bank sponsor may propose a credit release schedule where they receive no credits until after they complete construction, seeding and planting and receive as-built approval from the agencies. In this case, the agencies may approve the mitigation bank with only a maintenance assurance and without requiring a construction assurance. Because PRM project development is a condition of a permit and PRM project construction and planting likely occur concurrent with the authorized impact, the agencies are unlikely to waive a construction assurance in those cases.

C. Site Protection

A sponsor or project proponent shall grant a conservation easement under s. 700.40, Wis. Stats., to the DNR or shall execute a comparable legal instrument approved by the agencies to ensure that the restored, enhanced, preserved, or created wetlands and any creditable uplands are permanently protected and will not be destroyed or substantially degraded by any subsequent owner of or holder of interest in the property on which the bank site is located.

This perpetual easement identifies covenants and general provisions and places restrictions on using the mitigation bank to preserve the natural elements and values approved and outlined in the site plan. DNR has a standardized easement template sponsors should use to establish the conservation easement (Appendix F).

The agencies encourage sponsors to conduct the title review early in the planning process to ensure no existing site encumbrances would impact the ability to grant a conservation easement over the land. DNR will work with sponsors regarding any exceptions for encumbrances identified in the title review, such as utility easements, that may need to be modified or removed from the mitigation site before approval of the conservation easement.

Another title encumbrance issue is severed mineral rights. The Federal Mitigation Rule identifies mineral extraction as incompatible with a compensatory mitigation site, and mineral extraction is prohibited in Wisconsin's standard wetland bank conservation easement. Mineral rights exist on every property and are related to the extraction of underground resources such as iron ore or natural gas. Mineral rights pose a problem for compensatory mitigation projects when those rights have been severed and legally claimed by someone other than the fee title owner of the property. Sponsors must address severed mineral rights, usually by purchasing the rights, before agency approval of a compensatory mitigation site.

The sponsor must complete the following title review steps:

- Title Commitment (and subsequent Title Insurance Policy with Gap Endorsement):
    - Showing State of Wisconsin (Department of Natural Resources) as the insured.
    - For an insured amount determined by site acreage and land value by service area.
    - Covering the legal description of the mitigation site (not that of the sponsor's entire ownership).
- If the Title Commitment contains any exceptions for encumbrances, such as utility easements, pare them down and remove from the site so as not to show them on the Title Insurance Policy before approval of the conservation easement.
- Include a schematic with the Title Commitment showing the location of any exceptions (encumbrances) to the title as shown in Section BII of the Title Commitment.
- Include copies of all documents listed in Section BII (the exceptions) of said commitment with the Title Commitment.
- Mortgages do not need to be shown on the schematic; however, the lender (if applicable) will need to consent to the Easement so that the Mortgage exception does not show in the final policy. You must notify the agencies if you are currently in the process of refinancing or obtaining a Mortgage.

D. Long-Term Management (LTM) and Long-Term Management Funding

Background

The Federal Mitigation Rule requires long-term monitoring and maintenance of all mitigation sites. LTM activities should include a minimum standard of maintenance to ensure that mitigated wetlands continue to function to offset authorized impacts. LTM activities in the MP should be site specific and could include invasive species control and structure maintenance. The agencies may require LTM funding for mitigation sites depending on future threats to the ecological sustainability of the site and measure(s) the responsible party for long-term management may need to take.

LTM Planning

Sponsors must include sufficient information related to the site's anticipated LTM needs in the mitigation plan, including activities necessary to ensure functional gains at the site are maintained in the

long-term and the itemized costs associated with these activities. Sponsors must update LTM plans and funding after performance standards are met and before the agencies release final credits. Examples of the type of information that sponsors must provide include:

- Field visits/surveys and their frequency, such as annual timed meander surveys at the height of the growing season.
- Assessment of engineered features on the site, if applicable, including berms, tile outlets, or water control structures.
- Comparison of survey results with performance standards and coordination with the IRT.
- Management options for invasive non-native species if site conditions decline.
- Management of timber or other woody species, if applicable.
- Anticipated costs of the monitoring and maintenance activities necessary to ensure functional gains at the site are maintained in the long-term.

Sponsors may transfer the responsibility for LTM to a third party, such as a landowner, environmental organization, or public entity. If they transfer LTM responsibility, and the agencies require LTM funding, the LTM funding mechanism must be made available to the party responsible for LTM. Sponsors must provide documentation of such a transfer to the agencies, including granting property interest if the long-term manager differs from the sponsor.

If the IRT requires LTM funding, the sponsor will need to prepare the following information to develop a LTM plan in a proposed MBI or MP:

- An itemized list of anticipated annual monitoring and management activities along with their estimated frequency and costs.
- Identify the responsible entity for long-term management activities and LTM fund management.
- Discuss the LTM fund's management and use.
- The proposed fund's principal amount using the anticipated capitalization rate.

The DNR holds conservation easements for compensatory mitigation sites and monitors easements for violation issues to ensure protection for the site. Sponsors should be aware that LTM under the Federal Mitigation Rule is different from protection under a conservation easement, and they (or another entity if the sponsor transfers LTM responsibilities) must ensure sites are managed and maintained in perpetuity in accordance with the LTM provisions in the final MBI or MP.

LTM Funding

The Corps, in coordination with the IRT, determines on a case-by-case basis when LTM funding will be required for a mitigation site. LTM funding ensures that funds will be available to help maintain functional gains at the site after performance standards have been met and after the IRT has released all credits. Before site approval, the Corps will evaluate whether LTM funding is necessary for each mitigation site. LTM funding is more likely to be required for sites with one or more of the following characteristics:

- Enhancement-only sites requiring vegetation management.
- Sites with necessary prescribed burns.
- Sites that include a stream restoration component.
- Sites with high risk of encroachment from adjacent incompatible uses.

When the Corps requires LTM funds, sponsors must ensure the funds are sufficient to cover the cost of anticipated management activities after the monitoring period has ended. The sponsor must fully fund the LTM plan and ensure it is in place before the release from monitoring and, if applicable, the final release of credits.

The agencies prefer LTM funds to be the form of a third-party endowment fund (managed by a natural resource or community non-profit or governmental entity), but the sponsor may propose other funds for agency review on a site-specific basis. Any proposed long-term management fund should be interest-bearing and non-wasting for agency approval. Potential LTM fund mechanisms include non-wasting endowments, legally established trusts, contractual agreements with future responsible parties, or other legal established funding mechanisms, as appropriate.

4. Wetland Mitigation Site Identification and Development

A. Site Selection

Federal Mitigation Rule 33 CFR 332.3 identifies several factors the agencies consider related to mitigation site selection and site potential. A site must meet the needs of the watershed and be ecologically suitable for providing the desired aquatic resource functions. Not every site is eligible or suitable for approval for mitigation. The agencies have developed tools to assist sponsors in evaluating site potential. Sponsors should use these tools whether they seek a site in a specific service area or have a specific site in mind and wish to assess and demonstrate its potential. The following list of tools is not exclusive:

- Wisconsin Wetlands by Design Map Tool
- DNR WWCT (ILF Program) Compensation Planning Framework
- Watershed plans that inform wetland functional needs.
- Site Selection Criteria Checklist (Appendix A).

The Site Selection Criteria Checklist (SSCC) is divided into three primary categories. Category 1, Avoiding Fatal Flaws, is considered a standard requirement. A project must generally meet all relevant criteria for the agencies to determine the site's potential. Categories 2 and 3, Location within the Watershed and Site Characteristics, include criteria representing beneficial aspects (not exclusive) of a project that would likely contribute to overall ecological suitability.

The SSCC is intended to guide sponsors toward mitigation sites that meet federal requirements and have the potential for agency approval. However, sponsors should be aware that completing this checklist does not guarantee approval. An initial review of site characteristics in a completed checklist may show

that a site is unlikely to meet requirements or receive approval. Ultimately the agencies will base their decisions regarding site potential and approval on various site-specific factors, IRT coordination and comments, program goals and the requirements and considerations outlined in 33 CFR 332 and ch. NR 350, Wis. Adm. Code.

Sponsors should submit a completed SSCC with their prospectus (Bank and ILF) or mitigation plan (PRM), and any supplemental information and documentation needed to support each item. The agencies will use the provided information to evaluate the ecological suitability of the selected site and determine whether the site has potential as a compensatory mitigation site. The sponsor should update and submit this checklist with their draft MBI or draft mitigation plan for bank or ILF program sites.

B. Wisconsin Wetland Communities

The agencies use Wetland Community descriptions, adapted from Eggers and Reed (2011), for mitigation credit requirements and allotments at mitigation sites:

Table 1: In-Kind Plant Communities, further classified in Appendix J.

Wetland Community	Includes
Wet meadow	Fresh wet meadow, sedge meadow, wet to wet mesic prairie, fen
Marsh	Shallow marsh, deep marsh
Shrub swamp	Shrub-carr, alder thicket
Wooded swamp	Hardwood swamp, coniferous swamp
Floodplain forest	Floodplain forest
Seasonally flooded basin	Seasonally flooded basin
Bog	Open bog, coniferous bog
Shallow, open water	Shallow open water

Please note that Version 2 consolidates the Wetland Communities for easier credit tracking on mitigation sites, and recognition of overlapping functions and their frequent presence in wetland complexes on sites. Specifically, the agencies combine wet meadow plant communities into a single wetland and credit type as they are typically interspersed, are difficult to predict where and to what extent each will develop, and are difficult to delineate for precise mapping and crediting over time. The smallest plant community size sponsors should project and map for monitoring purposes is at least 0.2 acres. Sponsors can consolidate smaller communities into the most similar community type on the site.

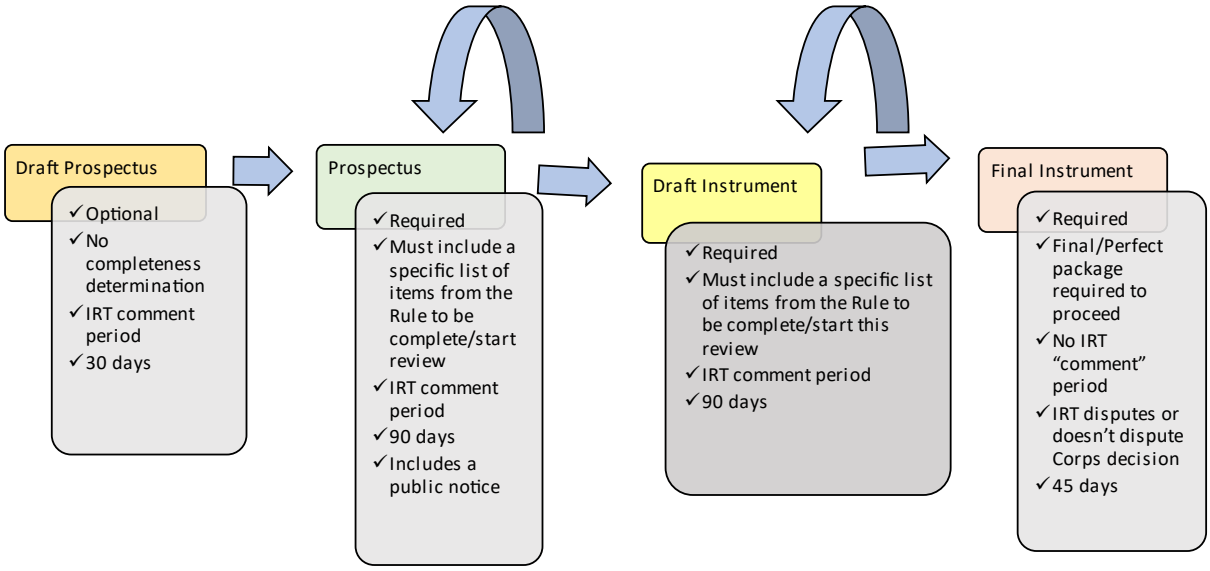
For mitigation banks approved prior to issuance of Version 2, agencies will honor and continue to release credits by community type as approved in their bank Instrument or permit. Sponsors with banks using credit classifications from Version 1 can consider and advertise any wet meadow communities as in-kind for project proponents looking to offset impacts to any of the inland meadow communities.

ILF advance credits for sale to project proponents will not have an associated plant community type because the mitigation project to offset impacts is completed after credit sales have been completed.

ILF programs do, however, track plant community types by acres in the impacts associated with credit sales and by acres through various mitigation activities on ILF project sites. This data may help to inform mitigation needs over time and ILF program site selection decisions.

C. Bank and ILF Site Proposal

The agencies will follow the review process outlined in 33 CFR 332.8 and ch. NR 350, Wis. Adm. Code, when reviewing a sponsor's proposed bank or ILF site. Before engaging in the review process, project sponsors should familiarize themselves with these rules, including the minimum information needed for complete submittals. The review of individual mitigation banks and ILF sites has four phases, three of which are mandatory. Each review phase begins with the sponsor's submittal of the draft prospectus (optional), prospectus, draft Instrument, and final Instrument. Each subsequent submittal should build upon the findings from previous agency reviews and incorporate changes into a single consolidated mitigation site plan.



Below is a basic overview of the results of each of the mandatory review phases.

- Prospectus: Agency review of the Prospectus results in a determination that either the site has potential or does not have the potential for providing compensatory mitigation for offsetting impacts authorized under the agencies' permitting authorities. To inform this determination, agency staff typically need to conduct a site visit. Results of the site visit, along with review of the prospectus, will inform the Corps' initial evaluation letter (IEL).

- Draft Instrument: Depending upon the adequacy of the draft Instrument, the Corps, in collaboration with the IRT, may require sponsors to submit revised draft Instruments and the associated mitigation plans, before submitting a final Instrument. This should be rare. However, some agency comments or site issues are more complex and are more likely to result in the need for revised draft Instrument, such as the need to develop an appropriate long-term management funding mechanism, design issues, missing baseline data that affects potential crediting, and the potential for a site, as designed, to hydrologically impact adjacent properties.[4]
- Final Instrument: The purpose of requiring revised draft instruments is to ensure that the final Instrument, once submitted, is readily approvable, without edits by agencies. Sponsors must incorporate all agency comments and changes into the final Instrument for the Corps to move forward with a notice to the IRT of intent to approve their proposal.

The agencies have also developed tools to aid development of site submittals and facilitate efficient agency review. The tools are currently available and are enclosed as appendices for sponsor use. As the agencies develop additional tools, they will integrate them into this document. Sponsors should periodically check agency websites for updated versions of the guidelines.

D. Permittee Responsible Mitigation Proposal

When compensatory mitigation is required for the agencies to issue a permit, applicants must include a mitigation plan with their permit application. If the permit applicant is proposing PRM, the mitigation plan must include specific information about the PRM project that is sufficient to facilitate agency review.

The minimum required information for a complete mitigation plan is in 33 CFR 332.4(c)(2-14) and s. NR 350.011(4), Wis. Adm. Code and Appendix D. This same information is required for mitigation plans for all forms of compensatory mitigation (bank, ILF sites, PRM sites). Sponsors should ensure that they discuss each component of a mitigation plan for both the impact site and compensation site, as this will support whether the PRM project is environmentally preferable under the preference hierarchy. For example, describe and quantify the aquatic resource type and functions to be impacted (temporary and permanent) and their contribution to the overall watershed, compared with those expected to be provided at the compensation site.

When drafting a complete mitigation plan, permit applicants should ensure their proposal complies with all requirements in the federal mitigation rule, ch. NR 350, Wis. Adm. Code, and these Guidelines, except those explicitly relevant only to bank and in-lieu fee programs. Tools referenced above in C. and included in appendices also provide helpful information.

PRM proponents should also include the following information in a mitigation plan for a PRM project:

[4] NR 350 requires an $800 fee for reviewing, investigating, and making decisions to approve or not approve mitigation bank instruments at the time that a mitigation bank sponsor submits a draft mitigation bank instrument to the department.

Site Location

- PLSS coordinates; latitude/longitude; written location description.

Maps and Figures

- Baseline wetland delineation map.
- National Wetland Inventory map.
- Soil Survey with hydric soils identified.
- Map showing location within the watershed.
- Zoning or planning maps of the PRM project and adjacent parcels, including existing and expected zones, administrative plats, identified road alignments, etc.
- Maps showing proposed PRM conditions identifying proposed compensation action types (rehabilitation, enhancement, etc.) and projected wetland communities.
- Topographic or LiDAR maps.
- Existing drainage infrastructure on site, such as drain tile or ditches, existing and to be removed, and whether they are publicly or privately managed.
- Property encumbrances known to exist onsite should be identified if applicable.

Aerial Photos

- From the last 10 years and at least one historic photo (if available) that indicates the historic condition that may be practicable to restore.

Tables

- Identifying acreages of existing versus proposed resource acreages.

Narrative

- A discussion of how the proposed resources adequately compensate for the acreages and types of resources to be impacted.

As pre-application discussions and application reviews progress, an applicant's compensatory mitigation proposal could evolve. For example, a permit applicant may plan to propose a PRM project but then a bank approval or release opens a preferable alternative, and their proposal may shift to provide bank credits. The reverse could also be true and may prompt issuing of a second public notice.

E. Mitigation Bank & ILF Program Instruments

The MBI is the legal document for the establishment, operation, and use of a mitigation bank. It also includes the mitigation plan providing specific information regarding bank site development and performance standards. The terms and conditions of the MBI may be amended, subject to notification of all IRT members and approval by the signatories. The agencies have developed a template MBI for all mitigation banks in Wisconsin containing all provisions required under 33 CFR 332 and ch. NR 350, Wis. Adm. Code. The agencies encourage sponsors to utilize the template and complete all sections. While sponsors can propose modifications to the template when necessary for legal reasons, sponsors should be aware that deviations from the agencies' approved text is likely to result in significant delays in bank review and approval as it may require review by all agency legal staff.

For ILF programs, the ILF Program Instrument is the legal document for the establishment, operation, and use of an ILF Program, advance credits, etc. It also includes the CPF described in Section 2, which outlines the site identification and prioritization process. Each ILF site has the same review and approval process as a single mitigation bank. As each ILF site is approved, the Mitigation Plan is signed by the agencies and sponsor and becomes an appendix of the ILF Program Instrument.

F. Methods of Generating Compensatory Mitigation Credit

Sites that meet all requirements and standards outlined herein can generate compensatory mitigation credit under the following credit types: re-establishment, rehabilitation, enhancement, preservation, creation, or upland buffer. The agencies will determine the appropriate ratio(s) for areas considering the information provided by sponsors. Therefore, it is crucial for sponsors to thoroughly demonstrate which areas of their site are eligible for credit under each type of compensation and the functional lift provided by comparing baseline versus proposed conditions. The agencies use changes in hydrology and vegetation functions to determine the appropriate credit type. The following table provides a general comparison of the extent of functional lift required to fall under each credit type:

	Re-establishment	Rehabilitation	Enhancement	Creation	Preservation	Upland Buffer
Hydrology Lift?						
Vegetative Lift?						
Increase in Wetland Acreage?						
Typical Ratio Range	**100%**	**50-100%**	**0-50%**	**50-100%**	**0-12.5%**	**0-25%**

Re-establishment

Re-establishment means manipulating a site's physical, chemical, or biological characteristics with the goal of returning natural/historic functions to a former wetland. Re-establishment results in an increase in wetland acreage. This form of restoration may involve re-establishing hydrology and topography on a site by removing fill; re-grading or re-contouring; filling ditches; removing drainage tile; re-establishing wetland plant communities via site preparation, seeding, and planting; or otherwise manipulating water levels to restore hydrology. Keep in mind that for the removal of sediment buildup (such as from erosion) to generate re-establishment (or rehabilitation) credit, the mitigation provider must also be

able to eliminate the source of sedimentation. Credit for restoration via re-establishment is often one credit for each acre restored (1:1), as it results in an increase in wetland acreage but is dependent upon the demonstrated projected hydrologic and vegetative lift over current baseline conditions. The re-establishment of historic hydrology, land contours, and plant communities will typically generate the highest credit.

Rehabilitation

Rehabilitation involves the restoration of historic (pre-European settlement) or closest achievable reference wetland conditions, functions, and services to a partially drained or hydrologically impaired area. Rehabilitation can occur in existing wetlands hydrologically impacted by drainage infrastructure, fill, or other hydrologic disturbances that the mitigation provider can restore. Rehabilitation occurs in existing wetlands and does not yield an increase in wetland acreage, but typically results in an appreciable increase in more than two wetland functions and must involve some level of measurable hydrologic restoration. Similar restoration techniques may be utilized to rehabilitate a degraded wetland as described above to re-establish a former wetland. Credit ratios may range from no credit to 1:1 dependent upon the demonstrated projected hydrologic and vegetative lift over current baseline conditions. Areas where manmade and functioning drainage infrastructure exists, is clearly and measurably affecting hydrology, and can be entirely disabled, are typically eligible for 50-100% credit. Areas where the infrastructure is failing or less well-defined or where the current effect of that infrastructure on hydrology is less clear are typically eligible for less than 50% credit.

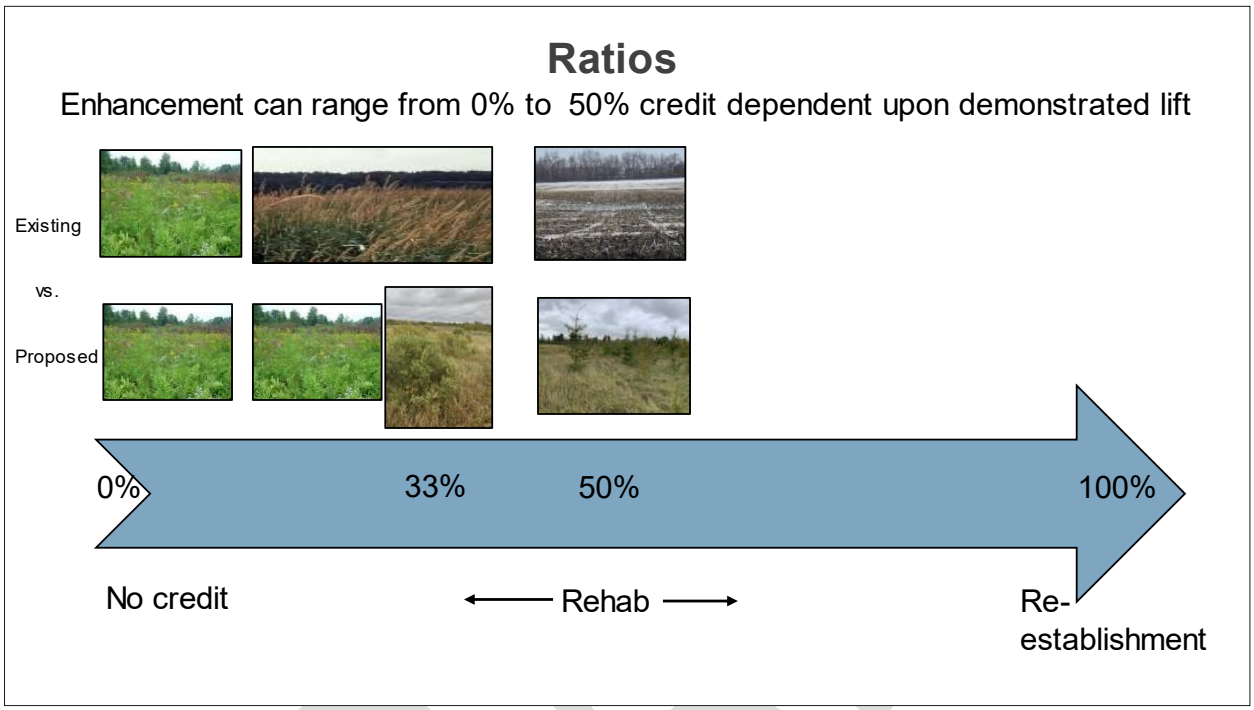
Enhancement

Wetland enhancement involves the improvement of hydrophytic vegetation without measurable hydrologic restoration. Agencies are more likely to approve re-establishment or rehabilitation because they increase more wetland functions than enhancement. Enhancement is typically only desirable or likely to receive agency approval when it is a component of a larger mitigation site involving reestablishment or rehabilitation.

The functional, including vegetative, lift provided by enhancement areas can vary widely, as can the potential for credit. The agencies approve the appropriate level of credit based on comparing the current condition and functions of the site to the projected condition and functions of the completed compensation site.

Typically, the agencies will require a vegetation survey as part of the mitigation plan to document the current condition of the area proposed for enhancement. Sponsors should base the credit projected for the enhancement area on the difference between the current surveyed conditions and the final expected conditions, which they would need to document with appropriate performance standards approved by the agencies. Where the difference between baseline and final performance standards is minimal, for example in a diverse wetland with minimal cover by invasive species, agencies are likely to approve little or no credit for nominal enhancement activities. The potential range in credit eligibility

for enhancement is broad, as shown in the figure below, and rarely will exceed 50%. Final agency decisions will depend on the sponsors' demonstration of baseline versus projected condition and final performance standards.



Further, to warrant any credit, the enhancement of vegetation must be permanent and likely to be sustainable in the long-term. Where vegetation enhancement is proposed adjacent to a substantial invasive species source outside the sponsor's control, agencies are likely to approve little or no credit for enhancement. Alternatively, agencies are more likely to approve enhancement credit when the sponsor provides a long-term management fund to ensure the area continues to be maintained, and the functional lift is permanent.

Creation

Creation refers to establishing a wetland where one did not historically exist (based on geophysical evidence) and does not currently exist. The agencies are generally unlikely to approve projects that are primarily creation because they have been less successful historically.

Exceptions may include but are not limited to creation along the edges of existing wetlands or landscape settings conducive to improving or creating certain wetland functions and services, creation proposals that are small parts of larger mitigation projects providing other types of functional lift, or creation that is adjacent to existing wetlands or fits into the natural landscape. If agencies agree that creation is appropriate, crediting at ratios of less than 1:1 is more likely, while 1:1 may be possible if the creation site is low risk, the cover type fits the landscape, and the site is connected to other wetlands/aquatic resources and upland buffers/corridors. Low risk refers to cases where hydrology data is sufficient to

ensure that the planned hydrology would be established. This includes data from monitoring wells, surface runoff analyses, modeling and/or connection to the river's 1- or 2-year flood events.

Creation sites lacking sufficient hydrology data present a higher risk of failure, therefore agencies will generally credit these projects at no more than 0.5:1, if at all. Similarly, agencies will generally credit creation sites that are isolated from other wetlands/aquatic resources and upland buffers/corridors or that provide limited wetland functions at no more than 0.5:1, or may not approve credit at all.

Preservation

Preservation means removing a threat to, or preventing the decline of, ecologically significant or rare or high-quality wetlands through long-term site protection that alone does not result in a gain of wetland resource area or functions.

Preservation may be used to provide compensatory mitigation only when all the following criteria are satisfied: the resources to be preserved provide important physical, chemical, or biological functions and services for the watershed; the resources contribute significantly to the ecological sustainability of the watershed; the preservation is determined to be appropriate and reasonable; the resources are under demonstrable threat of destruction or adverse modifications; the agencies have determined that preservation is appropriate as compensatory mitigation in the watershed; and the site will be protected in perpetuity.

As part of their prospectus (bank and ILF) or mitigation plan (PRM), mitigation providers must explain why the wetland site and each wetland resource type proposed for preservation meet each eligibility criteria above. The agencies will review the documentation provided and determine if it is sufficient to document eligibility. If not, the agencies will either ask the sponsor to provide additional details, or the agencies will determine that the resource is not eligible for preservation credit. To aid sponsors in assessing their resources for preservation eligibility, the agencies have identified several tools and considerations:

1. Important physical, chemical, or biological functions: This is not restricted to exceptional natural areas. This could include wetland resource assessment using the Wisconsin Rapid Assessment Methodology (WRAM), Hydrogeomorphic Approach (HGM), or other approved methodology determined by the permitting agencies. Sponsors can use the Floristic Quality Assessment Methodology for Wisconsin or Rapid Floristic Quality Assessment to assess the condition of plant communities within a proposed preservation site. Sponsors should also review all available state or local datasets on important resources to the local watershed, review watershed plans to see if the wetland onsite was identified as important for protection, assess the presence of state or federally recognized threatened or endangered species, etc.
2. Significant contributions to the watershed: Sponsors should consider the location of the resource in relation to the watershed or other important resources in the watershed and how the wetland ensures the sustainability of those resources. For example, sponsors could consider

the resource's rarity in the watershed, its difficulty to replace via mitigation, its location relative to other conserved properties, etc.

3. Demonstrable of Threat: There is no exclusive list of threats to a resource the agencies can provide for sponsor consideration and evaluation. Threats are regional, local, and site-specific. Sponsors could complete a title search to identify encumbrances (such as mineral rights, utilities, access, etc.). The sponsor would then need to demonstrate that the encumbrance could constitute a threat if exercised and that they are likely to be exercised. These encumbrances would then have to be removed for the wetland to be eligible for preservation. Sponsors could also review permitting, development or other trends in the immediate area and watershed to assess whether regulated or non-regulated activities threaten the particular wetland. To constitute a demonstrable threat, however, sponsors must be able to show that the threat is not only real but also imminent and likely to occur if the wetland is not protected.
4. Permanent Protection: To be eligible for preservation, the act of recording a site protection instrument must be sufficient to eliminate the threat to the resource. For example, a conservation easement granted to the state would prohibit logging, development, structures, etc. Still, it would not stop offsite activities, so identifying those threat(s) and source(s) is crucial.

Where preservation is proposed to provide compensatory mitigation, to the extent appropriate and reasonable sponsors should propose preservation in conjunction with restoration, enhancement, and/or creation. Sponsors should also develop a long-term management plan for the site to address issues to ensure that the preserved area is maintained as a high-quality plant community. On rare occasions, preservation may constitute the sole source of generating compensatory mitigation at a site with unique characteristics. The crediting ratio is often 0.125:1, or one credit for every 8 acres preserved.

Buffers and Reduced Credit Areas

A sufficient upland buffer is required to protect all proposed restoration areas from incompatible adjacent land uses. Additionally, upland areas are only eligible for buffer credit if the uplands protect and/or enhance aquatic resource functions associated with wetlands from disturbances related to adjacent land uses. It is up to the sponsor or PRM project proponent to demonstrate what benefits the upland provides to the wetland. In rare cases, interior upland islands not along the perimeter of the mitigation site, may be eligible for credit if the sponsor can demonstrate that they provide important protection or enhance wetland functions.

Agencies typically require a 100-foot buffer width for mitigation projects. For sites adjacent to another conserved property with minimal invasive species and no incompatible land uses, agencies may approve a buffer of less than 100 feet. If the buffer on a mitigation site is wetland, agencies will require a minimum 50-foot zone of reduced wetland credit. Upland buffer is typically eligible for credit at up to 25%, while upland buffers associated with the protection and enhancement of preservation areas are eligible for credit up to only 12.5%. Further, sponsors cannot derive more than 25% of the total credits at a compensation site from upland buffer. Unmanaged upland areas are not eligible for credit and may not be eligible for inclusion in the conservation easement.

5. Post Mitigation Plan Approval Actions

A. Site Construction, Planting and As-built Reporting

Once a sponsor receives agency approval of the MBI or a project proponent receives approval of their PRM mitigation plan, they can begin construction, provided all the necessary permits (wetland, stormwater, county, and local permits) are in place. The real estate conservation easement should be in place before construction begins on a mitigation site.

The agencies must approve any significant deviations from the proposed design before implementing changes onsite. Should the sponsor encounter situations requiring deviations from the approved design, they must email all members of the IRT and allow the agencies to provide timely input on questions and deviations and organize site inspections as necessary.

Considerations when starting construction	Considerations when planting and seeding	Things to include in your as-built report
•Is site prep complete, such as removal of barriers, weeds or other debris? •Are erosion control measures in place? •Ensure equipment is cleaned before entering or leaving the site to prevent spread of invasives. •Notify neighbors and agency personnel on when construction will begin. •Do site conditions support successful construction? For example, consider recent weather events and soil moisture. Have a plan for dealing with excess water, potential erosion, etc. •If site conditions require deviations from the approved plan, notify the agencies quickly as possible before making the adjustments. •Ensure elevations, boundaries and topographic elements are marked.	•Do current weather conditions support the successful establishment of plants? •Coordinate with the agencies if conditions warrant delays in seeding or planting, such as drought or heavy snowfall. This could delay completion of construction and planting for up to a growing season. •Ensure plants and seeds are adequately protected from weather conditions and predation. •Ensure proper seed storage.	•Compare approved site designs with as-built conditions via red line drawings. Should be survey level, identify final elevations of all earth work activities and structures, and identify deviations from the approved plan. •Include planting and seeding maps that clearly identify species and seed mixes. •Refer to the Corps As-built Report Requirements Checklist (Appendix G) and include all relevant information in your report.

As part of the review of the as-built report, the agencies complete a site inspection to review construction, seeding, and planting before the release of as-built credits. Sponsors of approved banks,

ILF sites, and PRM projects who recently completed construction or anticipate constructing during the current calendar year should contact their Corps Project Manager (PM) and WDNR as soon as possible before snowfall to schedule site visits. Sponsors must complete construction ahead of these visits. Sponsors may organize a visit before submitting their as-built report, especially if their as-built submittal might be delayed to after the first snowfall. If sponsors cannot finalize their as-built report before the site visit, they should work with the agencies to determine what information they should provide to facilitate an effective site review. Sponsors should anticipate that the agencies will hold off approving initial credit releases until either the Corps or other IRT member(s) can complete a site visit post-construction.

6. Annual Monitoring Reports

At the end of each year (or as required in the Mitigation Plan), sponsors provide the Corps of Engineers with an annual report. The report should provide enough detail and explanation to demonstrate to the agencies whether the performance standards have been met and whether the sponsor managed the site in compliance with the Instrument and Mitigation Plan requirements.

A typical annual report includes the following.

- A review of the Maintenance sections of the mitigation plan to determine the type, frequency, and location of management activities for the report.
- A review of the Monitoring sections of the mitigation plan for type, timing, and frequency of monitoring events, and locations of monitoring plots.
- Tracking of maintenance and monitoring activities to make sure those identified in the mitigation plan are completed.
- A review of the number of years a performance standard needs to be met for which habitat type.
- Monitoring well installation logs – include schematics, soil textures and depths. Reference U.S. Army Engineer Research and Development Center (ERDC) guidance on well installation.
- A table that summarizes the performance standards by area (as identified in the projected credit table) and clearly identifies which PS the sponsor believes have been met.
- If a technical performance standard has not been strictly met but the sponsor is requesting the release anyway, the report must include the rationale for why the PS should be considered met. Ex. Reference data vs. technical hydrology standard.
- Vegetation survey and hydrograph information.
- For hydrology monitoring, include hydrographs that include the ground surface and bottom of the well, identify the start and end of the growing season, etc. Ideally, overlay precipitation from the nearest weather station or gage.

The agencies have developed a template monitoring report to aid sponsors in development of clear monitoring reports that support efficient agency review and release of credits (Appendix H). Sponsors are not required to use this template verbatim but should review their templates to ensure their reports include the details and clarity the agencies need.

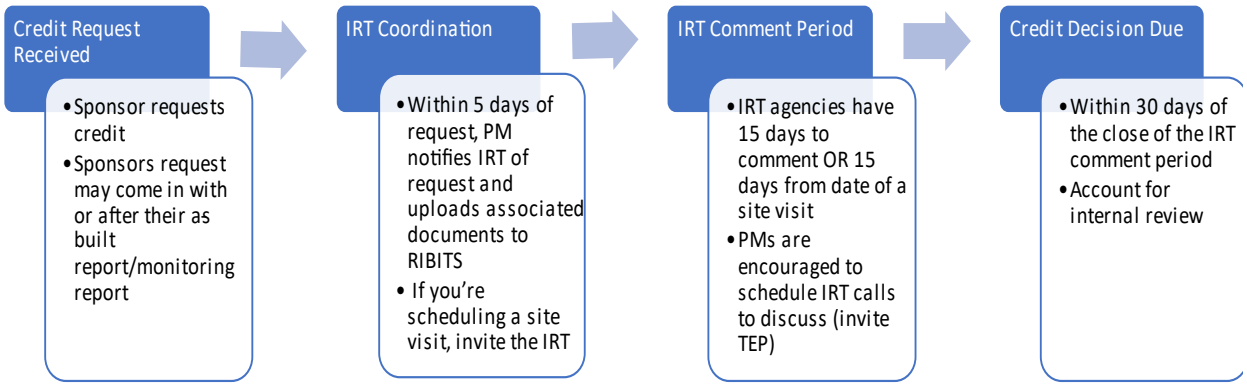
7. Credit Releases, Sales and Ledger Management

A. Releases

When a sponsor believes they have met their Instrument's administrative and ecological performance standards, they can request the agencies approve a credit release for their site. The request should clearly specify the number of credits requested and for meeting which standards.

Proposed credit releases must follow the acreages, projected credits, and percent releases approved in the credit release schedule table. The agencies will not approve partial releases (ex. releasing only a portion of an identified area's credits or not utilizing the approved percent released). However, sponsors can request the release of credits for some polygons of a site and not others so long as the polygons are identified in rows in the approved credit release schedule table. For example, if a site's wet meadow areas are meeting an interim performance standard but the shallow marsh is not meeting interim performance standard, the sponsor could request the release of wet meadow credits only.

The agencies will review all requests for release to determine if they meet the required performance standards and will consider the site's overall trend toward success. The Corps and IRT will review these requests via the process outlined in 33 CFR 332 and s. NR 350.009(4), Wis. Adm. Code, and sponsors should familiarize themselves with this review process. When anticipating a credit release in any given year, sponsors should consider timing of the release request and coordinate any appropriate site visits with the IRT in advance to prevent delays. If a site visit is necessary, the agencies may hold off on approving credit releases until a site visit can be completed.



If approved, the Corps will issue a credit release letter to the sponsor, outlining the credits approved for release versus withheld. Once the Corps issues a credit release, the Corps will enter the released credits in the bank's RIBITS ledger as available for sale.

The agencies will resolve changes to acreages, e.g., the site develops more of one wetland type than expected, at the final release unless continuing with interim releases as outlined in the schedule would result in an over-release of credits (overall or by type). In that event, the sponsor may need to propose a streamlined Instrument modification, which the agencies may review and approve concurrent with review of a credit release request.

B. Affidavits/Credit Sales

Affidavits of credit purchase are used to document a legal transfer of mitigation responsibility from the project proponent to the sponsor. The affidavit shows that a project proponent has secured the appropriate amount and type of credits from a mitigation bank or ILF program sponsor. When a credit purchase is made, the legal responsibility for providing the mitigation is assumed by a sponsor.

An affidavit of credit purchase should include the following information at minimum:

- ✓ Date of sale.
- ✓ Bank/ILF Site Information:
  - Name of individual mitigation bank or ILF program.
- ✓ Project/Impact Site Information:
  - Name of the project proponent (and authorized representative if the project proponent is a company, non-profit, agency, etc.).
  - Project Name.
  - Project impact location, Including township, range, section, and municipality.
  - HUC 8 watershed and service area name where the authorized impact will occur.
  - Relevant Corps and/or DNR permit numbers or exemption numbers.
  - Acreage of impacts by wetland community type, if applicable.
- ✓ Credit ratios applied and number of credits sold for each affected community.
- ✓ Community types of the mitigation bank credits sold (not required for ILF credits).
- ✓ Final credit amount(s).
- ✓ Printed names of both the project proponent or exempt project proponent and Mitigation Bank Sponsor.
- ✓ Signatures of both the project proponent or exempt project proponent and Mitigation Bank Sponsor.

Executed affidavits must be immediately submitted to the Corps at WisRIBITS@usace.army.mil and the WDNR Wetland Mitigation Coordinator (see DNR Mitigation Bank webpage). See Appendix I for an example affidavit.

C. Ledgers

To track credit availability for and use under state and federal permits, the Corps and DNR each keep a publicly viewable ledger for each bank. These ledgers document the credits available by community type, with the Corps' public ledger also documenting credits released and sold by community type, date of sale, permit/file number, and project proponent/purchaser. The agencies routinely conduct quality assurance reviews to ensure that the state and federal ledgers match and that all withdrawal entries are documented. Each sponsor must keep a ledger of their own to track releases, pending purchase agreements, and sales. It is the sponsors' responsibility to ensure that all affidavits are submitted to the agencies for timely entry.

The Corps' Ledger for individual banks can be found at RIBITS The state ledger for individual banks can be found on the DNR's Approved wetland Mitigation Banks webpage. Withdrawal affidavits are not uploaded as publicly visible, and the purchase price is not shown in either ledger.

The agencies will track credit releases and sales and post up-to-date credit availability as quickly as possible. Sponsors should monitor RIBITS and the DNR mitigation bank web page to ensure that sufficient credits are available prior to any individual credit sale. Sponsors submit their annual ledgers to the IRT members associated with the bank/ILF site. Mitigation bank sponsors may agree to credit sales prior to the first credit release but cannot execute withdrawal affidavits or transfer the mitigation responsibility from a project proponent to a sponsor until the Corps releases sufficient credits to satisfy the project proponent's credit requirement.

8. Modification of MBIs

At any time during the monitoring period, the sponsor can request a modification, or the agencies can determine that a modification of the approved Instrument is required to ensure compliance and performance of the site. Two types of modifications are outlined in 33 CFR 332: Standard and Streamlined.

A streamlined modification is typically reserved for changes to performance standards, the credit release schedule, adjustments to the types or areas of wetlands developing, and other changes that the agencies decide are minor.

A standard modification process is required for all changes to the Instrument not considered minor, such as the addition of acreages, substantial changes to the site's design or operation, or any change that warrants input beyond just the IRT. As a result, standard modifications require the Corps to issue a public notice to solicit public input, particularly from adjacent property owners. The agencies review the addition of each new ILF site to the ILF Instrument as a major Instrument modification.

The agencies recommend that sponsors meet with the IRT prior to submitting a request for modification. Review 33 CFR 332.8 and NR 350.009(5), Wis. Adm. Code, for details on the process required for modification forms.

Appendices

Sponsors Guidelines:

Appendix A: Fatal Flaws Checklist (Site Selection Criteria)

Appendix B: Timeline for Mitigation Bank Instrument Approval

Appendix C: Requirements for Submitting Complete Prospectus

Appendix D: Requirements for Submitting Complete Mitigation Plan

Appendix E: MBI Template

Appendix F: Conservation Easement Template

Appendix G: As-Built Report Checklist

Appendix H: Monitoring Report Template

Appendix I: Affidavit Template

Appendix J: Plant Community Types

Project Proponents:

None